Supreme Court U.S.
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No. _____

In The

Supreme Court of the United States

ERNEST N. MILES, *et al.*,

Petitioners,

v.

UNITED STATES OF AMERICA

Respondent.

On Petition For A Writ of Certiorari
To The United States Court of Appeals
For The Second Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I.R.C. § 3121(a) defines the term "wages" to mean "remuneration for employment." I.R.C. § 104(a)(2) provides that gross income does not include "damages received ... on account of personal injuries...." IBM Corporation, the former employer of petitioners, made payments to them, not to remunerate them for services, but primarily to prevent them from asserting their potential personal injury claims against IBM. The court below determined that an additional purpose for the payments was to preserve goodwill. The *amount* of the payment made to each petitioner was calculated under a formula based on salary and length of service. The questions presented are:

1. When an employer makes a payment to an employee to prevent the employee from asserting personal injury claims against the employer and/or to preserve goodwill--and not to remunerate the employee for services--does the fact that the *amount* of the payment is calculated using a formula based on salary and length of service transform the payment into "wages" within the meaning of I.R.C. § 3121(a?

2. When a payor makes a payment to an individual to prevent the individual from asserting potential personal injury claims against the payor, and the individual has bona fide personal injury claims that could have been asserted, must the *amount* of the payment be linked to the individual's particular injuries in order for the payment to be considered "received on account of personal injuries," within the meaning of I.R.C. § 104(a)(2)?

3. When a payor makes a payment to an individual to prevent the individual from asserting potential personal injury claims against the payor, and the individual has bona fide personal injury claims that could have been asserted, must the payor and the individual communicate about the individual's particular claims or injuries in order for the payment to be considered a settlement of a personal injury claim within the meaning of I.R.C. § 104(a)(2)?

LIST OF PARTIES

This action originated in the United States District Court for the Northern District of New York as a consolidated action by 786 named individual plaintiffs (including individuals added to the action as plaintiffs after the action was initially filed).[1] Of these 786 plaintiffs, one individual (the petitioner named in the caption hereof) was selected as a test case, and the action was suspended as to the other 785 plaintiffs pursuant to a stipulation under which, if respondent was successful as against the representative plaintiff, the complaint would be dismissed with prejudice against the remaining plaintiffs. (*See* App. 4a) On appeal to the Second Circuit Court of Appeals, all 786 plaintiffs were identified as plaintiffs-appellants, and all 786 plaintiffs are petitioners in this action. Their names are listed in the Appendix at App. 24a-39a. The United States of America is the only defendant in this action.

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[1] For purposes of these computations, a husband and wife whose claims are based on a jointly filed federal income tax return are counted as one individual.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners hereby petition this Court for a writ of certiorari to review the judgment and opinion of the Court of Appeals for the Second Circuit.

OPINIONS BELOW

The opinion of the court of appeals (App. 1a-2a) is reported at 231 F.3d 889 (2d Cir. 2000). The decision of the lower court from which the appeal is taken (App. 3a-20a) is reported at 76 F.Supp.2d 236 (N.D.N.Y 1999).

JURISDICTION

A final decision was entered by the court of appeals below on October 17, 2000. App. 1a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant portions of I.R.C. §§ 104, 3101, and 3121 are set forth in the Appendix, *infra*, at App. 21a-23a.

STATEMENT OF THE CASE

Petitioner[2] is a former employee of International Business Machines Corporation ("IBM") who left his employment with IBM in 1992 during IBM's workforce reduction (hereinafter, "downsizing"). Petitioner received a payment from IBM (a "Payment") in exchange for signing a General Release and Covenant Not To Sue. IBM reported the Payment on IRS Form W-2 and withheld income and employment ("FICA") taxes from the Payment pursuant to I.R.C. §§ 3402 and 3102, respectively. Petitioner filed a U.S. Individual Income Tax Return reporting his Payment as taxable income. Petitioner subsequently filed a claim for refund of both the income taxes and FICA taxes withheld from, or otherwise paid with respect to, his Payment. The IRS disallowed the refund claim, and petitioner instituted refund litigation in the United States District Court for the Northern District of New York as part of a consolidated action involving 786 plaintiffs. The court adopted a procedure under which petitioner was designated as a test-case plaintiff and the proceedings were suspended as to the remaining plaintiffs. App. 4a-5a.

In support of his income tax refund claim, petitioner argued that his Payment was excludable from gross income under I.R.C. § 104(a)(2) because IBM's principal purpose for making the Payment to him was to prevent him from asserting his bona fide potential personal injury claims.[3] In support of his FICA tax refund claim,

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[2] Hereinafter, the singular term "petitioner" will be used to refer to Ernest N. Miles, the test-case plaintiff named in the caption hereof.

[3] The term "personal injury claims" is used herein to mean tort claims based on personal injuries. For purposes of applying I.R.C. § 104(a)(2)

petitioner argued that his Payment was not subject to FICA taxes under I.R.C. § 3101(a) because the Payment was not made to his as "remuneration for employment" within the meaning of I.R.C. § 3121(a).

On cross-motions for summary judgment in the United States District Court for the Northern District of New York (hereinafter, the "trial court"), petitioner presented evidence showing that IBM, motivated by its desire to prevent its downsized employees, including petitioner, from asserting their potential personal injury claims, made Payments to those of its downsized employees, including petitioner, who agreed to release their potential claims as of the time they left their employment. Petitioner also presented evidence showing that IBM faced a significant risk of personal injury claims from the downsized employees, including petitioner, all of whom suffered varying degrees of reputational and emotional injury as a result of actions taken by IBM during the downsizing, and all of whom had bona fide personal injury claims that they could have asserted against IBM in the absence of releases. IBM testified that it did not make the Payments to remunerate any of its downsized employees for services, and there is no contrary evidence in the record.

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to payments received before August 21, 1996 (including the Payments at issue in this case), the term "personal injuries" includes "nonphysical injuries to the individual, such as those affecting emotions, reputation, or character" as well as "'personal embarrassment,' 'mental strain,' and injury to 'personal reputation.'" *United States v. Burke*, 504 U.S. 229, 236-37 n.6 (1992). Section 1605(a) of the Small Business Job Protection Act of 1996, Pub. L. 104-188, amended section 104(a)(2) to apply only to damages received on account of personal *physical* injuries or sickness. The amendment generally applies to all payments received after August 20, 1996.

Respondent disputed the fact that IBM's principal purpose for making the Payments was to prevent departing employees from asserting personal injury claims against IBM, proffering evidence showing that IBM implemented the downsizing programs to induce employees to leave their employment and that the Payments shared certain characteristics with severance payments that are not intended to settle potential claims.

The parties agreed that the amount of each Payment was determined under a formula based on the recipient's salary and years of service. Petitioner stipulated that, as of the time he received his Payment, he, personally, had not experienced any symptoms of physical or emotional harm and had not communicated with IBM regarding his personal injuries or potential personal injury claims.

The trial court made no finding as to whether IBM's principal purpose for making Payments to departing employees who signed releases, including petitioner, was to prevent them from asserting their potential personal injury claims. Instead, the court ruled that petitioner's Payment could not be considered a settlement of personal injury claims and could not be treated as made on account of personal injuries, as required by I.R.C. § 104(a)(2), because (1) there was no active dispute between petitioner and IBM regarding petitioner's particular injuries, and (2) the amount of petitioner's Payment was based on petitioner's salary and years of service. App. 15a-18a. The court further ruled that petitioner's Payment was necessarily "wages" within the meaning of I.R.C. § 3121(a), regardless of IBM's purpose for making it, because the Payment was made by an employer to its employee and the amount of the Payment was based on petitioner's salary and years of service. App. 19a.

On appeal, the Second Circuit Court of Appeals, in a *per curiam* decision, affirmed both of the trial court's rulings, expressly adopting the reasons stated in the trial court's opinion. App. 2a.

Petitioners have filed this petition for a writ of certiorari in order to seek review of those holdings.

A. IBM's Downsizing

In the late 1980s, IBM began to reduce the size of its workforce through a series of "downsizing" programs. IBM placed responsibility for workforce reduction on line managers, but the line managers were given little authority to terminate employees involuntarily because IBM desired to reduce the workforce through "voluntary" programs. Consequently, line managers used psychological pressure to encourage employees to resign or retire.

In 1991, IBM introduced new measures to persuade large numbers of employees to leave. These new measures included several employment practices that were intended to identify the employees who made the smallest relative contributions to its business. First, IBM announced that it was "raising the bar" when judging employee contributions. Second, IBM announced that, in the employee performance appraisal process, it would emphasize certain criteria that employees felt were highly subjective and subject to manipulation. Third, IBM adopted a company-wide "ranking" system, which IBM described as "a comparison of employees . . . to determine their relative contribution."

The changes to the performance appraisal system caused many employees to question the fairness and validity of their appraisals. Some employees experienced unexpected reductions in the rating of their job performance with little or no explanation. Moreover, few employees believed their rankings and performance ratings were confidential.

Some managers used the ranking process to pressure targeted employees into resigning or retiring. Some managers allowed nonessential employees to transfer into their departments with a view to using the ranking and appraisal process to induce those employees to leave IBM so that the managers could meet their workforce reduction targets. Some transferred employees were low-ranked in their new positions and then, with little chance to adapt, were told they were at risk of being terminated involuntarily.

During the early 1990s, IBM executives stated publicly that IBM was using the downsizing process to weed out deadwood and underperformers. It was widely known that IBM executives made those statements. Those statements created the false impression that any employee leaving IBM under the downsizing programs was likely to be an underperformer. That false impression was exacerbated by the fact that many employees were encouraged to leave IBM through the use of low rankings and performance appraisals.

The reputations of employees leaving IBM under the downsizing programs were damaged by IBM's statements. Many employers would not hire "downsized" IBM employees because IBM's public statements caused them to believe those employees were poor performers.

Petitioner testified that he suffered (1) reputational injuries as a result of public statements by IBM executives that IBM was using the downsizing process to weed out deadwood and underperformers and (2) additional reputational and emotional injuries as a result of events specific to him. Petitioner also stipulated that, as of the time he received his Payment, he had not experienced "symptoms" of physical or emotional harm.

B. IBM's Concern About Potential Personal Injury Claims

IBM's Fed. R. Civ. P. 30(b)(6) witness testified that IBM knew its employees would and did suffer emotional and reputational injuries as a result of the downsizing and that the employees complained to IBM management about their treatment. He testified specifically that: (1) IBM knew its employees would be emotionally and psychologically harmed by the impending downsizing; (2) IBM was concerned that many employees might complain about the ways in which managers sought to achieve workforce reduction targets; (3) IBM knew that employees believed the ranking process resulted in highly arbitrary evaluations of their contributions; (4) IBM knew that some employees believed IBM was trying to induce them to leave voluntarily by telling them they were underperformers whether or not it was true; (5) IBM knew that some employees felt that, as part of the downsizing process, they were subjected to overwork, assignment to unfamiliar positions, and unrealistic performance plans; (6) IBM knew that some employees who had been redeployed were low-ranked in their new positions and then, with little chance to adapt, were told they were at risk of being involuntarily terminated; (7) IBM knew that some employees who were encouraged to leave for

performance-based reasons would not view themselves as underperformers or lesser contributors; and (8) as downsizing progressed, IBM knew that some employees were suffering emotionally and were hurt by the downsizing.

IBM's witness also testified that IBM was concerned about the risk of widespread tort-based litigation. He testified that IBM knew that, in the absence of releases from the large numbers of departing employees: (1) the departing employees might assert claims alleging that the ranking and appraisal systems, and other managerial actions, injured their reputations and/or were being intentionally used to undermine their sense of self-worth; (2) those employees who had been redeployed and then had received low rankings or appraisals might assert claims alleging that IBM had made deliberate misrepresentations to lure them into positions in which they were likely to underperform or would be easy targets for criticism and pressure to resign; (3) the departing employees might assert claims for emotional and reputational injuries; and (4) the departing employees represented a threat of litigation that IBM wished to avoid. He also testified that IBM considered every departing employee to be a litigation threat.

IBM's witness testified that IBM knew about the employees' injuries, complaints, and potential claims because (1) the employees complained to management through mechanisms that IBM maintained to obtain information from employees, and (2) IBM was subject to employment-related lawsuits.

Petitioner was not among the employees who complained to management about their injuries and potential claims.

C. IBM's Reasons for Making Petitioner's Payment to Him

The General Release and Covenant Not To Sue that petitioner signed stated that petitioner's release of claims was "in exchange for" the Payment (App. 7a), and both the release and the trial court referred to the Payment as "the payment in exchange for the Release." App. 7a, 15a.

IBM's witness testified that IBM made the Payments to avoid litigation risks. He testified that: (1) the Payments were used by IBM as part of an approach that was designed to ensure that IBM's departing employees would not sue IBM after they left; (2) IBM intended the Payments to settle potential personal injury claims; (3) IBM made payments only to departing employees who signed releases because IBM considered every departing employee to be a litigation threat; (4) the Payments were not made gratuitously; (5) the Payments were not intended to be a substitute for income the employees would lose by leaving their employment; and (6) the Payments were not made for the purpose of remunerating or rewarding departing employees for services.

IBM's witness also testified that IBM made the Payments to induce employees to leave the company under programs that included releases of claims.

D. Structure of the Payments

A Payment was made to every employee who, between 1991 and 1994, departed IBM under a downsizing program and signed a release. The amount of each Payment was determined under a formula based on the recipient's salary and years of service. An employee who revoked the release after leaving the company and receiving a Payment was required to return the Payment but was not permitted to return to work. An employee who was rehired shortly after leaving the company and receiving a Payment was required to return a portion of the Payment.

E. The Proceedings Below

Throughout the proceedings in the trial court and on appeal, petitioner made the following arguments: (1) petitioner's Payment was excludable from income under I.R.C. § 104(a)(2), because petitioner had bona fide personal injury claims that he could have asserted against IBM, and IBM's principal purpose for making the Payment to petitioner was to prevent him from asserting any personal injury claims he might have; and (2) even if the court were to determine that IBM's principal purpose for making the Payment was to induce petitioner to leave employment, or that the Payment was not excludable from income under I.R.C. § 104(a)(2) for some other reason, the Payment still was not "wages" subject to FICA taxes because it was not made as "remuneration for employment" within the meaning of I.R.C. § 3121(a).

Jurisdiction in this case was conferred upon the trial court pursuant to 28 U.S.C. § 1346(a). The trial court granted respondent's cross-motion for summary judgment

and denied petitioners' cross-motion for summary judgment. The court of appeals affirmed the judgment of the trial court.

With respect to the income tax issue arising under I.R.C. § 104(a)(2), the trial court held that petitioner did not satisfy either of the two core requirements of I.R.C. § 104(a)(2), which were described by this Court in *Commissioner v. Schleier*, 515 U.S. 323, 337 (1995). The trial court interpreted those requirements as follows:

> First, the recovery must have been for damages (whether by suit or agreement) based upon an underlying tort or tort type cause of action. . . . [W]here no lawsuit was brought, it must be shown that the settlement agreement was reached in lieu of prosecution of such suit. [Citation omitted] As used in determining exclusion from taxable income, *"it is imperative that a 'settlement agreement' involve a bona fide dispute.* This prevents the use of a contrived 'settlement' designed to avoid taxation of the proceeds." [Citation omitted] Where the language of a settlement agreement is unclear or ambiguous on the issue of whether the payment is severance pay or in settlement of a legal claim, the intent of the employer in making the payment is determinative. [Citation omitted]

App. 13a (emphasis added).

> Second, the damages must have been received on account of personal injuries or sickness. [Citation to *Schleier* omitted] In order to be considered "received on account of personal injuries," damages must be attributable to the injury. In

> other words, *there must be a link between the personal injury and the amount of damages.*

App. 14a (emphasis added).

The trial court did not determine that IBM's principal purpose for making the Payment to petitioner was any purpose other than avoiding his potential tort claims. Instead, the court held that petitioner's Payment could not satisfy the first *Schleier* requirement because petitioner had not communicated with IBM regarding his claims or injuries, and IBM therefore did not make the Payment to petitioner because of its awareness of his individualized claims. App. 17a. The trial court reasoned:

> IBM's recognition of tort risk does not make a tort claim for Miles. This is true particularly in light of Miles' complete lack of any symptoms of injury, his failure to assert or threaten any claim against IBM, and his complete lack of communication with IBM regarding any injury or claim. Recognition of a general risk of tort claims led IBM to require employees to sign a Release in order to receive a lump sum payment. IBM cannot be said to have intended to settle a tort claim of Miles, or any other employee, when it did not know that any such claim existed.

App. 17a.[4]

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[4] The following testimony of IBM's witness brings into focus the trial court's holding that a payment to settle hitherto unasserted personal injury claims does not satisfy the first *Schleier* requirement:

The trial court also held that the Payments did not satisfy the second *Schleier* requirement because: "The payment was calculated based upon [petitioner's] years of service and salary, and was in no way linked to any personal injuries he may have suffered." App. 17a-18a.

With respect to the FICA tax issue arising under I.R.C. § 3121(a), the trial court did not determine that IBM's purpose for making the Payment to petitioner to remunerate him for employment or for service. Instead, citing this Court's decision in *Social Security Board v. Nierotko*, 327 U.S. 358 (1946), the trial court held:

> [T]he payments were made by IBM, as employer, to [petitioner] its employee. The payment amount was calculated based upon [petitioner's] employment with IBM, using a formula taking into account [petitioner's] years of service and salary.

> Q: Did IBM intend the payments under the voluntary transition payments to be settlements of actual tort claims for personal injuries, emotional or physical?
>
> A: You ask actual claims, the answer is no. * * * We had no knowledge at that time of any specific claims that would have, to my knowledge or IBM's knowledge, that would fall under that category. However, to the extent that claims later arose in that specific category, we intended to settle those claims too.
>
> Q: So your answer is indicating, if I'm correct, that you're speculating on claims that might have been found later by a court to have been an actual personal injury claim?
>
> A: Correct. There may have - we intended to settle all claims whether we knew about them, suspected they existed or later on found they existed.

Joint Appendix, as filed with the court of appeals, at JA147-48.

> The payment must be considered as compensation within the employment relationship, although not for work actually done. [Citations omitted] Accordingly, the payment [petitioner] received from IBM is subject to the social security employment tax and he is not entitled to a refund.

App. 19a.

The court of appeals adopted the trial court's holding and reasons therefor, in a one-sentence *per curiam* opinion. App. 2a.

REASONS FOR GRANTING THE WRIT

A. The Court of Appeals' FICA Ruling Is Inconsistent With the Plain Language of I.R.C. § 3121(a), Misapplies This Court's Decision in *Social Security Board v. Nierotko*, 327 U.S. 358 (1946), and Is Inconsistent With Other Circuit Court Decisions

The court of appeals' decision imposes FICA taxes on noncompensatory payments, ignoring the plain language of the applicable statutory provisions and a well-developed body of case law holding that a payment to an employee is "wages" for FICA and income tax withholding purposes only if it is made to compensate the employee for the employee's service.[5] The court of

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[5] The definition of "wages" for income tax withholding purposes, set forth in I.R.C. § 3401(a), is essentially identical to the FICA definition. I.R.C. § 3401(a) defines "wages" to mean "all remuneration . . . for services performed by an employee for his employer . . . ." Although the specific exceptions provided by I.R.C. § 3121(a) and I.R.C. § 3401(a) differ, and the penultimate sentence of I.R.C. § 3121(a) permits the IRS to adopt administrative exceptions under I.R.C. § 3401(a) without having them apply automatically to I.R.C. § 3121(a) as well, the basic

appeals' decision is based on an erroneous interpretation of this Court's decision in *Social Security Board v. Nierotko*, 327 U.S. 358 (1946).

I.R.C. § 3101(a) imposes FICA taxes on "wages . . . received . . . with respect to employment." I.R.C. § 3121(a) states that, for FICA purposes, "wages" means "remuneration for employment." I.R.C. § 3121(b) states that, for purposes of I.R.C. § 3121(a), "employment" means "any service, of whatever nature, performed . . . by an employee for the person employing him . . . ." Read together, these provisions limit the FICA tax base to "wages," meaning "remuneration for any service, of whatever nature, performed . . . by an employee for the person employing him."

Under the plain language of these provisions, in order for a payment to an employee to be subject to FICA taxes, the payment must be made to "remunerate," or compensate, the employee for "service."[6] A payment that is made to an employee for a noncompensatory purpose cannot be "wages" subject to FICA taxes under the plain language of the statute.

In *Social Security Board v. Nierotko*, 327 U.S. 358 (1946), this Court held that the term "wages," as used in the

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definition in both provisions equates "wages" with "remuneration for services." In *Rowan Companies, Inc. v. United States*, 452 U.S. 247, 249 (1981), this Court described the basic definitions of "wages" in I.R.C. § 3121(a) and I.R.C. § 3401(a) as "substantially identical."

[6] The *American Heritage Dictionary* (Second College Edition, 1991) gives the following definition for "remunerate": "1. to pay to (a person) for goods provided, services rendered, or losses incurred. 2. To compensate for; make payment for: *remunerate his efforts.*"

computation of Social Security benefits (*see* 42 U.S.C. § 409), included back pay awarded to an employee under the National Labor Relations Act ("NLRA") to a wrongfully discharged employee, even though the employee did not actually perform any service during the period for which he received the award.

The *Nierotko* Court analyzed three distinct terms in the definition of "wages" in the Social Security Act, which is essentially identical to the definition in I.R.C. § 3121. First, the Court determined that the award under the NLRA was "remuneration," reasoning that the award was intended to be a substitute for wages lost as a result of the employer's wrongdoing. 327 U.S. at 364-65. Second, the Court determined that the terminated employee had "employment," reasoning that the NLRA treated the employee as continuing to be an employee despite the discharge. 327 U.S. at 365. Third, the Court determined that the term "service," as used in the Social Security Act definition, was not limited to productive work but included "the entire employer-employee relationship for which compensation is paid to the employee by the employer." 327 U.S. at 365-66.

Following the *Nierotko* decision, some courts have held that back pay and front pay awarded to a wrongfully discharged employee are "wages" for tax purposes. *See, e.g., Gerbec v. United States*, 164 F.3d 1015 (6th Cir. 1999) (damages awarded under ERISA § 502(a)(3) in lieu of lost earnings are "wages" for FICA purposes); *Mayberry v. United States*, 151 F.3d 855 (8th Cir. 1998) (same); *Hemelt v. United States*, 122 F.3d 204 (4th Cir. 1997) (same); *Ainsworth v. United States*, 399 F.2d 176 (Ct. Cl. 1968) (back pay awarded under the federal Back Pay Act of 1956 is "wages" for FICA purposes).

In *Gerbec*, the Sixth Circuit reasoned: "The holding in *Nierotko* clearly supports the conclusion that awards representing a loss in wages, both back wages and future wages, that otherwise would have been paid, reflect compensation paid to the employee because of the employer-employee relationship, regardless of whether the employee actually worked during the time period in question." 164 F.3d at 1026.[7]

At the same time, post-*Nierotko* decisions have uniformly and correctly held that payments to an employee for noncompensatory reasons are not "wages" for FICA or income tax withholding purposes.

In *Allstate Insurance Co.. v. United States*, 530 F.2d 378 (Ct. Cl. 1976); *Humble Oil & Refining Co. v. United States*, 442 F. 2d 1362 (Ct. Cl. 1971); and *Humble Pipe Line Co. v. United States*, 442 F. 2d 1353 (Ct. Cl. 1971), the Court of Claims (the predecessor of the Federal Circuit Court of Appeals[8]) held that employer reimbursements of employee moving expenses were not "wages" because the reason for the reimbursement was to induce the employees to move. In *Humble Oil*, the Court of Claims explained that the

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[7] The Fifth Circuit has rejected the reasoning adopted by the Sixth, Eighth, and Fourth Circuits in *Gerbec*, *Mayberry*, and *Hemelt*, respectively. In *Dotson v. United States*, 87 F.3d 682, 689-90 (5th Cir. 1996), the Fifth Circuit held that a payment to settle a claim for loss of earning capacity under ERISA § 502(a)(3) was not "wages," reasoning: "The [payment] compensated for the 'loss in earning capacity,' not for services already performed, and is thus not subject to wage taxation."

[8] All decisions of the Court of Claims entered before September 30, 1982, have been adopted as binding precedent by the Federal Circuit Court of Appeals. *See South Corp. v. United States*, 690 F.2d 1368, 1379 (Fed. Cir. 1982).

payments "were not meant by Humble to be in any sense compensation 'for services performed.'" 442 F.2d at 1367.

In *Hotel Conquistador, Inc. v. United States*, 597 F.2d 1348, 1350 (Ct. Cl. 1979), *cert. denied*, 44 U.S. 1032 (1980), the Court of Claims held that the value of meals made available to hotel employees for the purpose of minimizing the amount of time the employees would need for meals during working hours was "not 'remuneration' and, therefore, not 'wages.'"

In *Stubbs, Overbeck & Associates, Inc. v. United States*, 445 F.2d 1142 (5th Cir. 1971), the Fifth Circuit held that *per diem* payments paid as living allowances to employees at a remote worksite "were not made as compensation for services performed and, consequently, were not 'wages' within the meaning of section 3401(a)." *Id.* at 1150. The Fifth Circuit explained: "It should be noted that Section 3401(a) does not provide that *all* payments made to an employee are wages. In order to be wages, the payments must be made 'for services performed.' . . . An employee may receive economic benefits from his employer that are not subject to the withholding provisions of the Code." 445 F.2d at 1149.

In *Central Illinois Public Service Co. v. United States*, 435 U.S. 21, 30-31 (1978), this Court cited *Humble Pipeline*, *Humble Oil*, and *Stubbs, Overbeck* with approval. In *Central Illinois*, this Court flatly rejected as "facile" the United States' argument that every payment by an employer to an employee constitutes "wages" for tax purposes if it is "a result of the employment relationship and [is] a part of the total of the personal benefits that arose out of the relationship." 435 U.S. at 29.

Here, there has been no factual finding that IBM made the Payment to petitioner to remunerate him for services, however broadly the term "services" is defined. To the contrary, the trial court determined that the Payments were made "in exchange for the Release" (App. 15a) and "to maintain the good will of the employees and the community." App. 17a.[9] *Neither* of those purposes is a purpose to "remunerate" employees for services or employment, whether based on the dictionary definition of "remunerate,"[10] or based on this Court's explanation of the term in *Nierotko*.

Indeed, in *Lockheed Corporation v. Spink*, 517 U.S. 882, 895 n.7 (1996), a case involving the prohibited transaction rules in ERISA, Justice Thomas pointed out that benefits paid "as part of an early retirement plan [do] not compensate the employee so much for services rendered as for the distinct act of leaving the company sooner than planned."[11] There is no authority equating an inducement to leave employment with "remuneration for services."[12]

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[9] The court did not determine which of those purposes was the principal purpose for the Payments.

[10] *See* note 4 *supra*.

[11] *See also Waterman v. Commissioner*, 179 F.3d 123, 127 (4th Cir. 1999), *aff'g* 110 T.C. 103 (1998) ("Because *the separation payment was not compensation for Waterman's service but an inducement to leave Navy service*, the Court holds that Waterman was not entitled to the exclusion for combat zone service [under I.R.C. § 112].") (emphasis added).

[12] The Federal Circuit recently held that payments to employees under a voluntary "early out" plan were "wages" where the record showed that the payments were made to reward employees "for hard work and faithful service" and "were designed to replace wages." *Associated Electric Cooperative, Inc. v. United States*, 226 F.3d 1322, 1327 (Fed. Cir. 2000). *Associated Electric* does not state that a payment to induce an

IBM's witness expressly testified in this case that the Payments were *not* made for the purpose of remunerating or rewarding departing employees for services and were *not* intended to be a substitute for income the departing employees would lose by leaving their employment.

Indeed, the *only* fact in the record that suggests *any* relationship between petitioner's Payment and petitioner's service is the formula under which the *amount* of his Payment was computed. Nothing in the record, however, links that formula with a compensatory intent. To the contrary, IBM's witness testified only that the formula was used because it was familiar to the employees, as it was used in computing severance payments, and because would seem fair to them. Moreover, the record is replete with evidence establishing a noncompensatory purpose for the Payments.[13]

In the absence of a proper finding that petitioner's Payment was made for the purpose of remunerating him for service, and *no such finding has been made or could be made on the record in this case*, the holding of the court of appeals cannot be squared with the plain language of I.R.C. § 3121(a) or with the well-developed case law construing the term "wages" for tax purposes. Surely, the fact that a formula was used to calculate the amount of the

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employee to leave employment is "wages" if the payment is not intended to reward departing employees for past services.

[13] Some circuit court decisions have emphasized payment formulas in determining that the payments in issue therein were wages. *See, e.g., Local 141 Fund v. United States*, 64 F.3d 245 (6th Cir. 1995); *Lane Processing Trust v. United States*, 25 F.3d 662 (8th Cir. 1994). In every one of those cases, however, there was no evidence of a noncompensatory purpose for the payments.

Payment cannot transform it from a noncompensatory payment into a taxable compensatory payment.

The court of appeals' decision, if allowed to stand, will adversely affect the many thousands of United States workers who accept payments from their employers as inducements to leave their jobs through "downsizing" programs, as well as their employers.[14]

The Court should grant a writ of certiorari in this case to clarify that payments made to obtain releases of potential tort claims, to induce employees to leave their jobs, or for other noncompensatory purposes, are not "wages" within the meaning of I.R.C. § 3121(a).

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[14] Such programs are frequent and are widely reported. For example, on December 13, 2000, General Motors Corp. announced that it would eliminate 6,000 jobs in North America through early retirements and other incentives ("GM Plans Deep Cuts in U.S. and Overseas," *Wall Street Journal*, December 13, 2000); on January 25, 1999, AT&T Corporation announced that 20,000 of its employees had accepted early retirement offers ("AT&T Posts 58 Percent Profit Rise," *Associated Press*, January 25, 1999); on October 13, 1998, Bell Atlantic Corp. announced that 5,200 employees had accepted early retirement offers ("Bell Atlantic Expects Profit Hit," *Associated Press*, October 13, 1998); on September 5, 1998, Ford Motor Company announced that it would offer early-retirement payments to 2,000 employees ("Ford Starts Job-Rating Buyouts Next Week," *Detroit Free Press*, September 5, 1998, at 1A).

B. The Court of Appeals' I.R.C. § 104(a)(2) Ruling Misapplies This Court's Decision in *Commissioner v. Schleier*, 515 U.S. 323 (1995), Is Inconsistent With Longstanding I.R.C. § 104(a)(2) Case Law, and Will Affect Many Cases Involving Settlements of Contested Claims

In 1994, in *Commissioner v. Schleier*, 515 U.S. 323 (1995), this Court held that I.R.C. § 104(a)(2) does not apply to back pay and liquidated damages awarded under the Age Discrimination in Employment Act of 1976 ("ADEA"). The Court held that both types of ADEA damages "are not received 'on account of personal injury or sickness,'" 515 U.S. at 332, and, accordingly, no portion of an ADEA award is excludable from gross income. 515 U.S. at 327. One basis for this holding was that, under the ADEA, awards of back pay and liquidated damages are both inherently independent of the existence or extent of any personal injury. 515 U.S. at 330-31.[15]

The Court illustrated this point by contrasting an ADEA recovery with a recovery of lost wages by the victim of an automobile accident. *See* 515 U.S. at 329-30. An accident victim is able to recover lost wages *only because* the loss of wages is one of the consequences of an accident victim's personal injury. An ADEA claimant, however, may recover both back pay and liquidated damages without even alleging that any personal injury resulted from the claimed discrimination. Hence, lost wages recovered by an accident victim are "received on account of personal injuries," while damages recovered by an ADEA claimant are not.

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[15] *Schleier* also held that an ADEA claim is not based on "tort or tort type" rights, as required by 26 C.F.R. § 1.104-1(c). 515 U.S. at 334.

The *Schleier* Court did *not* hold that damages received by an accident victim are excludable only if the *amount* of damages is based on the victim's particular injuries. That is, *Schleier* neither holds nor even suggests that a payment made to settle an asserted or latent claim by an accident victim is not "received on account of personal injuries" within the meaning of I.R.C. § 104(a)(2) unless the *amount* of the payment is somehow linked to the victim's actual injuries.

Yet this is exactly how the court of appeals below has interpreted the *Schleier* decision. The trial court stated:

> In order to be considered "received on account of personal injuries," damages must be attributable to the injury. In other words, there must be a link between the personal injury and the amount of damages. [Citation to *Schleier* omitted]

App. 14a.

> [T]he payment Miles received was not on account of personal injuries or sickness. [Citation to *Schleier* omitted] The payment was calculated based upon Miles' years of service and salary, and was in no way linked to any personal injuries he may have suffered.

App. 17a-18a.[16]

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[16] Petitioner does not dispute that it is appropriate to take the method of computing the amount of petitioner's Payment into account in weighing all of the evidence as to IBM's principal purpose for making the Payment. However, the courts below did not determine IBM's purpose. Rather, the courts held that petitioner's Payment was not

The court of appeals' decision represents a fundamental departure from traditional I.R.C. § 104(a)(2) jurisprudence. It is well settled that "whether a settlement is exempt from taxation depends on the nature of the claim settled and not on the validity of the claim." *Seay v. Commissioner*, 58 T.C. 32, 37 (1972); *accord, Threlkeld v. Commissioner*, 87 T.C. 1294, 1297 (1986), *aff'd*, 848 F.2d 81 (6th Cir. 1988); *Metzger v. Commissioner*, 88 T.C. 834, 847 (1987), *aff'd*, 845 F.2d 1013 (3d Cir. 1988). Thus, for example, I.R.C. § 104(a)(2) applies to the settlement of a personal injury claim where the defendant disbelieves that the claimant has suffered any injury and pays an arbitrary amount to avoid the cost of litigation. In *Stocks v. Commissioner*, 98 T.C. 1 (1992), I.R.C. § 104(a)(2) applied to a portion of a settlement payment equal to the taxpayer's annual salary. In no prior case has a court held I.R.C. § 104(a)(2) inapplicable to a payment settling a personal injury claim because of the manner in which the amount of the payment was computed.

Under the court of appeals' holding, if a delivery truck struck an automobile, and the owner of the truck offered to pay $10,000 to each occupant of the automobile for a release of his or her potential claims, without investigating the extent of his or her injuries, I.R.C. § 104(a)(2) could not apply to the payments, even though the clear purpose of the payment was to avoid prosecution of personal injury claims.

Here, petitioner introduced substantial evidence demonstrating that (1) he had bona fide personal injury claims that he could have asserted against IBM in the

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"received on account of personal injuries" irrespective of IBM's purpose for making the Payment.

absence of a release and (2) IBM made the Payment to him in exchange for a release to prevent him from asserting those claims. Neither the trial court nor the court of appeals found to the contrary. The manner in which the amounts of his Payment was computed should not preclude application of I.R.C. § 104(a)(2) as a matter of law.

Likewise, the court of appeals' holding that petitioner's Payment did not satisfy the first *Schleier* requirement finds no support in the *Schleier* decision. *Schleier* involved the settlement of a litigated claim under the ADEA, and the *Schleier* Court was not called upon to determine whether I.R.C. § 104(a)(2) applies to a payment made to preempt an unasserted, potential personal injury claim. Sound considerations of tax policy, however, compel equal treatment of settlements of asserted claims and settlements of unasserted, potential claims.

Referring to the hypothetical example set forth at page 24 above, if I.R.C. § 104(a)(2) could not apply to a payment made to settle unasserted, potential personal injury claims, each $10,000 payment in the example would necessarily be taxable simply because the recipients of the payments had not notified the payor of their claims and injuries.[17]

If the decision below is allowed to stand, the application of I.R.C. § 104(a)(2) will be in doubt whenever an injured taxpayer accepts an early settlement offer made without investigation of the taxpayer's injuries; accident

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[17] *See* Rev. Rul. 84-108, 1984-2 C.B. 32, in which the Internal Revenue Service ruled that I.R.C. § 104(a)(2) applied to a payment by an insurance company in exchange for a release preempting the payee's unasserted, potential claims against the insured.

victims who accept early settlement offers will be treated less favorably by the tax laws than those who pursue their claims aggressively. Surely, this Court did not intend the *Schleier* decision to have such an effect.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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No. _____

In The

Supreme Court of the United States

ERNEST N. MILES, *et al.*,

Petitioners,

v.

UNITED STATES OF AMERICA

Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Second Circuit

APPENDIX
TO ERNEST N. MILES, *ET AL.*'S
PETITION FOR A WRIT OF CERTIORARI

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APPENDICES

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

MARIE N. ABBOTT, et al.,

Plaintiffs-Appellants,

- v. -

UNITED STATES OF AMERICA,

Defendant-Appellee.

No. 00-6029

Argued: Oct. 11, 2000

Decided: Oct. 17, 2000

Appeal from a judgment of the United States District Court for the Northern District of New York, David N. Hurd, Judge, dismissing action seeking refunds of federal income and social security taxes withheld from lump-sum payments made to them by their employer upon the termination of their employment.

Affirmed.

Neil D. Kimmelfield, Portland, Oregon (James T. McDermott, Ball Janik, Portland, Oregon, on the brief), for Plaintiffs-Appellants.

Donald B. Tobin, Attorney, Tax Division, United States Department of Justice, Washington, D. C. (Paula M. Junghans, Acting Assistant Attorney General, Kenneth L. Greene, Attorney, Tax Division, United States Department of Justice, Washington, D.C., Daniel J. French, United

States Attorney for the Northern District of New York, Syracuse, New York, on the brief), for Defendant-Appellee.

Before: NEWMAN and KEARSE, Circuit Judges, and KORMAN, Chief District Judge.*

PER CURIAM:

The judgment dismissing plaintiffs' action seeking refunds of federal income and social security employment taxes withheld from lump-sum payments, made to them by their employer upon the termination of their employment, calculated on the basis of each plaintiff's salary and years of service, and conditioned on the signing of releases, is affirmed substantially for the reasons stated in the opinion of the district court, reported at 76 F. Supp.2d 236 (1999). Accord Abrahamsen v. United States, _____ F.3d _____, 2000 WL 1434500 (Fed. Cir. Sept. 28 2000); Associated Electric Cooperative, Inc. v. United States, _____ F.3d _____ 2000 WL 1434498 (Fed. Cir. Sept. 28 2000).

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* Honorable Edward R. Korman, Chief Judge of the United States District Court for the Eastern District of New York, sitting by designation.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

MARIE N. ABBOTT, et al.,

Plaintiffs,

- v. -

UNITED STATES OF AMERICA,

Defendant.

3:96-CV-51 0

Argued: Oct. 11, 2000

Decided: Oct. 17, 2000

O'Connor, Gacioch & Pope, Binghamton, NY, Thomas F. O'Connor, of counsel, Ball Janik LLP, Portland, OR, for plaintiffs, James T. McDermott, Neil D. Kimmelfield, of counsel.

Daniel J. French, United States Attorney for the Northern District of New York, Syracuse, NY, William H. Pease, Assistant U.S. Attorney, of counsel, United States Department of Justice, Tax Division, Washington, DC, for defendant, Alan Shapiro, D. Patrick Mullarkey, of counsel.

MEMORANDUM-DECISION and ORDER

HURD, District Judge.

I. INTRODUCTION

Plaintiffs brought the instant action seeking a refund of all or a portion of the federal income and social security employment taxes paid by them when they received lump

sum payments from their employer, International Business Machines Corporation ("IBM"), at the time of their separation from IBM's employ. A previous motion to dismiss brought by the defendant United States was denied without prejudice to renew after the completion of discovery.

There are 737 named plaintiffs in this action, and that number was expected to increase to over 800.[1] Thus, in order to streamline the discovery phase of this action, the parties agreed to and the undersigned, in the prior capacity of magistrate judge, ordered that plaintiffs designate one representative plaintiff. The representative plaintiff must have received a payment from IBM, experienced no symptoms of physical or emotional harm, nor asserted or threatened any claim against IBM, and not communicated with IBM regarding his or her injuries or claims, prior to signing a General Release and Covenant Not To Sue ("Release") and receiving a payment from IBM. Complete discovery was then to be permitted as to the representative plaintiff.

Additionally, plaintiffs were required to stipulate that if the defendant was ultimately successful on a motion dispositive of liability as against the representative plaintiff, all plaintiffs in the action agreed to withdraw the complaint in its entirety, with prejudice. On the other hand, if the plaintiffs were successful on a motion dispositive of liability with regard to the representative plaintiff, including appeals, the parties would be permitted complete discovery as to all plaintiffs.

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[1] While plaintiffs do not state a total amount of refunds sought, it appears as though the refunds at issue in this case approach $15 million, plus interest.

APPENDIX B

Plaintiffs selected one Ernest N. Miles[2] ("Miles") as their representative plaintiff. Plaintiffs certified that prior to signing a Release and receiving his payment from IBM, Miles did not experience symptoms of physical or emotional harm, did not assert or threaten any claim against IBM, and did not communicate with IBM regarding his injuries or claims. Plaintiffs did stipulate that, if defendant were successful on a dispositive motion as to liability to Miles, all claims would be withdrawn with prejudice. Complete discovery was then taken by the parties relating to Miles. The parties also proceeded with open discovery of non-party IBM, with regard to any and all plaintiffs.

II. PROCEDURAL POSTURE

On June 29, 1998, defendant filed a motion in limine to preclude the testimony at trial of Dr. H. Michael Peter. On June 30, 1998, the defendant filed two additional motions in limine to preclude the testimony at trial of plaintiffs' legal expert Richard Reibstein, Esq. and to preclude the use of certain documents. Plaintiffs oppose the motions in limine.

On March 5, 1999, plaintiffs filed a motion for summary judgment package pursuant to Local Rule 7.1 (b)(1) that included defendant's opposition to the motion as well as plaintiffs' reply. Also on March 5, 1999,

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[2] Ernest N. Miles and Betty J. Miles, his wife, were named as the representative plaintiffs because they filed a joint income tax return for 1992, the tax year in question. The presence of Mrs. Miles as a co-plaintiff is irrelevant to the issues presently at hand and therefore will be ignored for the purposes of simplification.

defendant filed a motion for summary judgment package pursuant to Local Rule 7.1 (b)(1) that included plaintiffs' opposition as well as its reply. Further, defendant filed a motion to strike certain testimony and documents in the event a trial takes place. Plaintiffs oppose the motion to strike.

Oral argument on these motions was heard on June 15, 1999, in Utica, New York. Decision was reserved.

III. FACTS

Following are the undisputed facts as set forth by the parties. Only detail sufficient for determination of the pending motions is set forth.

During the late 1980's and early 1990's, the computer market move away from centralized mainframe computers resulted in IBM changing its product mix, reallocating employee resources, and generally downsizing. In the fall of 1991 IBM changed the method by which it evaluated employees, resulting in stricter scrutiny and lower overall performance evaluations. IBM used the performance evaluations as part of the criteria in making downsizing determinations. In addition to retraining and redeploying employee resources, in 1990 through 1996 IBM operated both voluntary and involuntary downsizing programs. The primary purpose for the downsizing programs was not to obtain waivers of claims from employees nor to compensate or settle personal injury or any other tort claims of employees. IBM designated the employees eligible to participate in the downsizing programs based upon a determination of surplusage in specific skills or positions.

The downsizing programs were essentially an incentive for employees to terminate their employment

with IBM, either through resignation, pre-retirement leave of absence, or early retirement. IBM provided a lump sum payment calculated based upon years of service and salary at the time of termination. IBM withheld income and employment taxes from all lump sum payments made under its downsizing programs. As a condition of participation in a downsizing program, IBM required employees to sign a Release.[3] IBM notified employees that

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[3] Following is the text of the Release:

GENERAL RELEASE AND COVENANT NOT TO SUE

. . . . .

IBM ADVISES YOU TO CONSULT AN ATTORNEY BEFORE YOU SIGN THIS RELEASE

If you feel that you are being coerced to sign this release or that your signing would for any reason not be voluntary, or you believe the process by which you have been offered this release or the payment in exchange for this release is discriminatory,[1] you are encouraged to discuss this with your management or Personnel before signing this release. After reviewing the release with your attorney, you can discuss concerns you have with your manager or your attorney can contact legal counsel at your location. You should thoroughly review and understand the effects of the release before signing it.

In exchange for the sums and benefits which you will receive pursuant to the terms of the Modified and Extended Individual Transition Option Program (ITO 11 Program), (Name of Individual) (hereinafter "you") agrees to release International Business Machines Corporation (hereinafter "IBM") from all claims,

demand actions or liabilities you may have against IBM of whatever kind, including but not limited to those which are related to your employment with IBM or the termination of that employment. You agree that this also releases from liability IBM's agents, directors, officer, employees, representatives, successors and assigns (hereinafter "those associated with IBM"). You agree that you have executed this release on your own behalf, and also behalf of any heirs, agents, representatives, successors and assigns that you may have now or in the future You also agree that this release covers, but is not limited to, claims arising from the Age Discrimination in Employment Act of 1967, as amended, Title VII of the Civil rights Act of 1964, as amended, and any other federal or state law dealing with discrimination in employment on the basis of sex, race, national origin, religion, disability, or age. You also agree that this release includes claims based in theories of contract or tort, whether based on common law or otherwise. This release does not include your vested rights, if any, the IBM Retirement Plan, which survive unaffected by this release.

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[1]The Age Discrimination in Employment Act prohibits employment discrimination based on age and is enforced by the Equal Employment Opportunity Commission (EEOC). Other federal laws prohibit discrimination in employment based on sex, race, color, national origin, religion, handicap, or veteran status. These laws are enforced by the EEOC and the U.S. Department of Labor. There are also state and local laws

if the voluntary downsizing programs did not have sufficient participation, involuntary actions would be taken to effect the necessary downsizing.

During the period when downsizing was occurring, IBM was aware of discontent among some employees due to the new method of evaluating performance and the downsizing programs. IBM was also aware that some employees were emotionally injured due to the downsizing. IBM knew that some employees believed IBM had breached an implied contract with them, had discriminated against them on account of age, race, religion, or other individual characteristics in the manner in which the downsizing took place, or had arbitrarily given them low performance evaluations to induce them to participate in voluntary downsizing programs. IBM believed that some employees would file contract and or tort lawsuits against it relating to its performance evaluation and downsizing programs. Due to this concern about litigation, IBM designed a broad general release form and required employees to sign the Release in order to participate in a voluntary program.

Miles, who was educated as an electrical engineer, commenced his career with IBM on March 31, 1964. He was employed at IBM's Endicott, New York, facility. During the 1980's Miles worked in a department referred to as packaging, working on equipment used to test circuit cards and boards. In the late 1980's IBM informed Miles and other employees that their performance and productivity would have to increase in order to maintain

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prohibiting discrimination, which are enforced by state and local human rights agencies.

IBM Dep. Ex. 2 at PLOO045.

APPENDIX B

the same level evaluation. In 1989 and thereafter Miles received a performance level at his evaluation that put him at risk for adverse action. In April 1989 Miles requested and received a transfer to programming, a department in need of employees with programming skills. Miles took instruction in programming at IBM-taught classes and received on-the-job training in the programming department. Although Miles was an entry-level programmer, he retained his previous salary level. Accordingly, he was evaluated against experienced programmers. Consequently, he continued to receive poor performance evaluations. At his request, in August 1991 Miles transferred back to packaging. In November 1991 Miles was given another poor evaluation.

In the fall or winter of 1991 IBM released to employees, including Miles, information pertaining to a downsizing program. In January 1992 Miles received an additional poor evaluation. At that time he was told that within thirty days he would be given the poorest possible performance level, making him ineligible for participation in any downsizing program but subjecting him to involuntary termination. It was also suggested to Miles that he consider participation in the currently-available voluntary downsizing program. On February 10, 1992, Miles submitted his application to participate in the downsizing program. His employment with IBM terminated on July 31, 1992. At that time Miles was sixty years of age and had been employed by IBM for twenty-eight years.

Miles believes that he was unfairly forced to terminate his employment with IBM. He also believes that characterizing him as a poor performer damaged his work reputation. However, as of July 31, 1992, Miles did not suffer any physical illness or emotional injury as a result of

his poor performance evaluations and the offerings of various downsizing programs between 1988 and 1992. Miles considered the lump sum payment as compensation for lost income he would have earned if he had worked until 1996 then retired, at age 65. He also considered the payment as compensation for what he perceived as unfair performance evaluations during his last few years of employment with IBM and for signing the Release.

At the time that he signed the Release, Miles felt that any rights that he had to sue IBM were worthless, such that it was a good opportunity to give up any such right in exchange for the lump sum payment. However, he was not anxious to leave his employment with IBM, and would not have left if he felt he truly had a choice. On July 31 1992, Miles' last day of work, he signed a Release and received his lump sum payment of $46,023.00 less taxes withheld, along with the tax withholding statement. The tax withholding statement reflected $11,291.00 withheld for income tax and $2,092.00 for social security employment tax, amounts that IBM paid to the Internal Revenue Service ("IRS"). Miles duly filed a tax return for the 1992 tax year, including the lump sum payment of $46,023.00 as wages or salary. On January 25, 1995, Miles sought a refund of the taxes withheld from the IRS. On April 18, 1995, the IRS disallowed Miles' refund. Miles now is participating in this action, timely filed on March 28, 1996, against the United States to secure such refund from the IRS.

IV. DISCUSSION

A. Summary Judgment Standard

Summary judgment must be granted when the pleadings, depositions, answers to interrogatories, admissions and affidavits show that there is no genuine

issue as to any material fact, and that the moving party is entitled to summary judgment as a matter of law. Fed. R. Civ. P. 56; Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247 (1 986). Facts, inferences therefrom, and ambiguities must be viewed in a light most favorable to the nonmovant. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986); Project Release v. Prevost, 722 F.2d 960, 968 (2d Cir. 1983). Once the moving party has met the initial burden of demonstrating the absence of a genuine issue of material fact, the nonmoving party "must set forth specific facts showing that there is genuine issue for trial." Fed. R. Civ. P. 56; Liberty Lobby, Inc., 477 U.S. at 250; Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986); Matsushita Elec. Indus. Co., 475 U.S. at 587. At that point the nonmoving party "must do more than simply show that there is some metaphysical doubt as to the material facts." Matsushita Elec. Indus. Co., 475 U.S. at 586. To withstand a summary judgment motion, sufficient evidence must exist upon which a reasonable jury could return a verdict for the nonmovant. Liberty Lobby, Inc., 477 U.S. at 248-49; Matsushita Elec. Indus. Co., 475 U.S. at 587. Moreover, where the nonmovant has the burden of proof at trial, the moving party can meet its initial burden by demonstrating the absence of evidence in support of an essential element of the non-movant's claim. Ginsberg v. Healey Car & Truck Leasing, Inc., 189 F.3d 268, 270 (1999). Once that initial burden is met, the non-movant must adduce some evidence supporting the essential elements of its claim. See id. at 271-72.

B. Income Tax

An income tax is imposed upon taxable income. I.R.C. § 1. Taxable income is gross income minus any permitted deductions (other than the standard deduction). § 63.

Gross income is "all income from whatever source derived." § 61. Excluded from gross income is "the amount of any damages received (whether by suit or agreement and whether as lump sums or as periodic payments) on account of personal injuries or sickness." § 104(a)(2)(1988)(amended 1996[4]). Inclusions in income must be broadly construed, while exclusions from income must be narrowly construed. Commissioner v. Schleier, 515 U.S. 323, 327-28 (1995); Taggi v. United States, 35 F.3d 93, 95 (2d Cir. 1994). Moreover, the burden of proving that a claim falls within an exclusionary provision rests upon the party claiming the exclusion. Taggi, 35 F.3d at 95.

In order to be excluded from income pursuant to § 104(a)(2), two requirements must be met. Schleier, 515 U.S. at 337. First, the recovery must have been for damages (whether by suit or agreement) based upon an underlying tort or tort type cause of action. Id. "The term 'damages received (whether by suit or agreement)' means an amount received (other than workmen's compensation) through prosecution of a legal suit or action based upon tort or tort type rights, or through a settlement agreement entered into in lieu of such prosecution." Taggi, 35 F.3d at 95 (quoting 25 C.F.R. § 1.104 1 (c)). Thus, where no lawsuit was brought, it must be shown that the settlement agreement was reached in lieu of prosecution of such suit.

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[4] The text of this section was subsequently amended to exclude damages received "on account of personal physical injuries or physical sickness." I.R.C. § 104(a)(2) (1999 Supp.) This amendment, however, is inapplicable where, as here, the payment in question was made before August 20, 1996, the date of enactment. Pub. L. 104-188 § 1605(d)(1).

See id. As used in determining exclusion from taxable income, "it is imperative that a 'settlement agreement' involve a bona fide dispute. This prevents the use of a contrived 'settlement' designed to avoid taxation of the proceeds." Id. at 96. Where the language of a settlement agreement is unclear or ambiguous on the issue of whether the payment is severance pay or in settlement of a legal claim, the intent of the employer in making the payment is determinative. Agar v. Commissioner, 290 F.2d 283, 284 (2d Cir. 1961).

In addition to settling a bona fide dispute, the underlying action must be tort or tort like. Availability of compensatory damages is a hallmark in determining whether the underlying cause of action is tort or tort like. Schleier, 515 U.S. at 335. Traditional intangible harms such as emotional distress, pain and suffering, and reputational damage are recompensed by way of a tort or tort like suit. Id. at 335-36 (quoting United States v. Burke, 504 U.S. 229, 239 (1992)). Thus, an action may be characterized as tort or tort like where available damages compensate for the personal injury, including consequential damages such as emotional distress. Id. at 336.

Second, the damages must have been received on account of personal injuries or sickness. Id. at 337. In order to be considered "received on account of personal injuries," damages must be attributable to the injury. In other words, there must be a link between the personal injury and the amount of damages. Id. at 330.

Plaintiffs argue that the lump sum payment made by IBM to Miles, as representative plaintiff, is excluded, at least in part, pursuant to I.R.C. § 104(a)(2), from taxable income as damages received by settlement of claims for personal injuries. Defendant, however, points out that no

evidence brings Miles' payment under the exception. Accordingly, in order to withstand summary judgment in the face of defendants' demonstration that no evidence supports an exception, plaintiffs must adduce some evidence that the payment Miles received from IBM is excludable from income pursuant to section 104(a)(2), as set forth above. See Ginsberg, 189 F.3d at 270-72. Scrutiny of the undisputed facts leads to the inexorable conclusion that Miles' payment does not fall within the exclusion of section 104(a)(2).

First, Miles' payment was not damages received by a settlement of any underlying tort or tort type cause of action. See Taggi, 35 F.3d at 95. Plaintiffs seek to characterize the payment and signing of the Release as a settlement of personal injury claims. The agreement reached between Miles and IBM arose out of a business downsizing, or reduction in force, conducted by IBM. There was no bona fide dispute between IBM and Miles regarding personal injuries suffered by Miles. See id. Miles was unaware, at the time he signed the Release and received the payment, that he had suffered, or was suffering, from personal injuries. Miles had not notified IBM nor communicated with it in any way regarding any symptoms of physical or emotional harm he suffered. Miles had not asserted or threatened any claim against IBM. Plaintiffs have adduced no facts that an underlying bona fide tort or tort type claim existed. Accordingly it cannot be said that the payment in exchange for the Release in any way constituted settlement of a personal injury claim. See id. at 95-96; Abrahamsen v. United States, 44 Fed. Cl. 260, 269 (Fed. Cl. 1999).

Plaintiffs posit that the testimony of their medical expert, Dr. H. Michael Peter ("Dr. Peter"), shows that Miles

did in fact suffer from an injury prior to signing the Release Defendant has moved to preclude this testimony. For the purposes of the summary judgment motions defendant's motion is denied and Dr. Peters testimony is accepted. However, in the event that this case proceeds to trial, defendant may request that this issue be revisited. Accepting Dr. Peter's testimony that Miles suffered from emotional injuries of which he was and is unaware does not help plaintiffs' position. Even if Miles did suffer such injury, since he and IBM were both unaware that such injuries existed, then they could not enter into a settlement of claims regarding the injuries. In other words, on July 31, 1992, the parties could not settle a claim that neither knew to exist.

Plaintiffs point to IBM testimony that it recognized the possibility that some disgruntled employees who were separated from employment in the downsizing program might file suit against it in support of their averment that IBM's intent in making the payments was to settle legal claims. More specifically, plaintiffs argue that the legal claim for which IBM was at risk were tort claims. In support of this argument they proffer the expert testimony of Richard Reibstein, Esq. ("Reibstein"). Reibstein posits that evaluation of employment downsizing programs led to the determination that employers faced a risk of suit from terminated employees. Of the risk faced, 95 percent of the risk is attributable to tort claims, while 5 percent of the risk would be for contract or other non-tort claims, according to Reibstein. Plaintiffs aver that this testimony shows that IBM intended to settle tort claims with the payments and Release.

Defendant also moved to preclude the Reibstein testimony. Again, for the purposes of the summary

judgment motions, this motion is also denied and the testimony will be considered. Again, in the event this matter goes to trial, defendant may renew its preclusion motion.

Accepting Reibstein's testimony that IBM faced a risk of lawsuits from former employees, and that 95 percent of that risk would be tort based, is unavailing to plaintiffs' argument. IBM acknowledges that it faced a risk of lawsuits and some of that risk involve tort claims. IBM required employees participating in a downsizing program, including Miles, to sign a Release in order to protect itself from such lawsuits. In addition IBM made the payments to maintain the good will of employees and the community. These undisputed facts do not lead to the conclusion that IBM intended the payment to Miles to settle an underlying tort claim.

IBM's recognition of tort risk does not make a tort claim for Miles. This is true particularly in light of Miles' complete lack of any symptoms of injury, his failure to assert or threaten any claim against IBM, and his complete lack of communication with IBM regarding any injury or claim. Recognition of a general risk of tort claims led IBM to require employees to sign a Release in order to receive a lump sum payment. IBM cannot be said to have intended to settle a tort claim of Miles, or any other employee, when it did not know that any such claim existed. Reibstein's testimony regarding IBM's tort risk does not provide evidence that Miles' lump sum payment was in whole or in part made as a settlement of a claim for personal injuries.

Second, the payment Miles received was not on account of personal injuries or sickness. See Schleier, 515 U.S. at 336. The payment was calculated based upon Miles'

years of service and salary, and was in no way linked to any personal injuries he may have suffered. See id. at 330. Again accepting Dr. Peter's testimony for purposes of this motion, it cannot be said that Miles received the payment on account of personal injuries he did not know he had. The payment was exclusively linked to Miles' employment with IBM. Plaintiffs have adduced no facts even suggesting that the payment Miles received on July 31, 1992, was attributable to a personal injury he actually suffered. See id.; Abrahamsen, 44 Fed. Cl. at 270.

Defendant has met its initial burden of pointing out an absence of evidence to support plaintiffs' claim that Miles' payment falls under the section 104(a)(2) exception. Plaintiffs have failed to meet their burden of setting forth some evidence that the lump sum payment made to Miles was excludable from taxable income pursuant to section 104(a)(2). Based upon the undisputed facts, defendant has established its entitlement to judgment dismissing Miles claim for an income tax refund.

C. Social Security Employment Tax

Wages, or "all remuneration for employment," are subject to employment taxes to fund social security programs. 26U.S.C.A. § 3121(a) (1999 Supp.). Employment is "any service, of whatever nature, performed" by an employee for an employer. § 3121 (b). Service means "not only work actually done but the entire employer-employee relationship for which compensation is paid to the employee by the employer." Social Security Bd. v. Nierotko, 327 U.S. 358, 365-66 (1946). Given the purpose of the social security system, the statute must be interpreted to provide broad coverage. Id. at 365.

APPENDIX B

Plaintiffs contend that the payment made to Miles is not subject to the employment tax because it was not made in exchange for services. However, the payments were made by IBM, as employer, to Miles its employee. The payment amount was calculated based upon Miles' employment with IBM, using a formula taking into account Miles' years of service and salary. The payment must be considered as compensation within the employment relationship, although not for work actually done. See Nierotko, 327 U.S. at 365-66; Abrahamsen, 44 Fed. Cl. at 272. Accordingly, the payment Miles received from IBM is subject to the social security employment tax and he is not entitled to a refund. Defendant is entitled to summary judgment on this claim. See Nierotko, 327 U.S. at 365-66; Abrahamsen, 44 Fed. Cl. at 272.

V. CONCLUSION

The testimony of Dr. Peters and Reibstein is accepted for the purposes of determining the summary judgment motions, but may be revisited if a trial in this matter occurs. Defendant's other evidentiary motions are denied as moot.

The payment made to Miles by IBM does not fall within the exception for settlement of personal injury claims set forth by section 104(a)(2). Therefore the payment is subject to income tax. Further, the payment falls within the broad coverage of the term wages for the purposes of social security employment taxes. There being no genuine issue of material facts, defendant is entitled to judgment as a matter of law. Based upon the stipulation of plaintiffs to withdraw all claims should summary judgment be decided adversely to Miles, the complaint will be dismissed in its entirety. Accordingly, it is

APPENDIX B

ORDERED that

1. Plaintiffs' motion for summary judgment is DENIED;

2. Defendant's motions to preclude the testimony of Dr. Peter and Reibstein are DENIED without prejudice to renew in the event of trial and defendant's remaining evidentiary motions are DENIED as moot; and

3. Defendant's motion for summary judgment is GRANTED; and the complaint is dismissed in its entirety.

The Clerk of the Court is directed to enter judgment accordingly.

IT IS SO ORDERED.

United States District Judge

Dated: December 3, 1999

Utica, New York.

APPENDIX B

I.R.C. § 104, as in effect in 1991-94 (excerpts)

(a) IN GENERAL.—Except in the case of amounts attributable to (and not in excess of) deductions allowed under section 213 (relating to medical, etc., expenses) for any prior taxable year, gross income does not include—

* * *

(2) the amount of any damages received (whether by suit or agreement and whether as lump sums or as periodic payments) on account of personal injuries or sickness; * * * *

I.R.C. § 3101 (excerpts)

(a) OLD-AGE, SURVIVORS, AND DISABILITY INSURANCE.—In addition to other taxes, there is hereby imposed on the income of every individual a tax equal to the following percentages of the wages (as defined in section 3121(a)) received by him with respect to employment (as defined in section 3121(b))-- * * * *

APPENDIX D

I.R.C. § 3121 (excerpts)

(a) WAGES.—For purposes of this chapter, the term "wages" means all remuneration for employment, including the cash value of all remuneration (including benefits) paid in any medium other than cash; * * * *

APPENDIX E

Complete List of Petitioners

Marie N. Abbott, Palmer W. Agnew, Carl F. Ahsmann, Robert H. Albert and Anna M. Albert, Duane V. Allen and Judith H. Allen, Richard C. Alt and Sharon A. Alt, Michael P. Alunni and Corinne A. Alunni, Harry G. Anderson, Jr. and Lois J. Anderson, Donald J. Annis, John A. Antonaitis and Ann C. Antonaitis, Eugene P. Arnold, Frederick J. Arnold and Anne F. Arnold, Leon H. Arnold and Joan P. Arnold, Anthony N. Arnone and Sylvia Arnone, Nicholas C. Arvanitakis and Eleni N. Arvanitakis, Jack D. Atwater and Sharon E. Atwater, Peter F. Bakanowski and Judith M. Bakanowski, Raymond D. Baldwin and Susan L. Baldwin, Edward C. Baldyga and Helena M. Baldyga, Thomas E. Balon and Helene V. Balon, Edward F. Bandarovich and Linda A. Bandarovich, Richard L. Baradet and Grace S. Baradet, Michael B. Baratta and Ann Marie B. Baratta, Gerald D. Barniak and Jannice M. Barniak, Dorothy L. Barno and John R. Barno, Joseph E. Barr and Joan E. Barr, Russell J. Barr and Carolyn C. Barr, Robert L. Barto and Madeline A. Barto, Christopher W. Basile and Marie M. Basile, Joseph F. Basista and Margaret L. Basista, Robert N. Bason and Holly H. Bason, John G. Baumberger and Audrey M. Baumberger, Theodore V. Baxter and Dawn M. Baxter, Raymond G. Bayer and Barbara A. Bayer, George H. Bean and Adele A. Pangburn, Leonard Becchetti and Deanna E. Becchetti, John J. Bechtold, Nathaniel A. Beckwith and Mary A. Beckwith, John A. Bellacicco and Domenica A. Bellacicco, Paul W. Bennett and A. Jean Bennett, Thomas L. Bennett and Margaret J. Bennett, Raymond F. Berchtold and Sandra S. Berchtold, Raymond William Besemer and Anneliese S. Besemer, David R. Best and Patricia K. Best, Rodney S. Bidwell and Donna L. Bidwell, Richard F. Blachowiak and Kathleen M.

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and Karen S. Graney, Gerald M. Grant, Daniel C. Greco and Rosemary Greco, Paul A. Gregson and Doris M. Gregson, Joseph A. Griffin and Patricia Griffin, Alphonse Guida and Gunni Guida, Paul S. Gursky and Phyllis T. Gursky, Jackie L. Gutshall and Joann P. Gutshall, Elizabeth A. Haas and James T. Haas, Frank W. Haining and Sandra M. Haining, Christopher E. Hale, Francis J. Hallas and Carolyn R. Hallas, Marilyn A. Hanafin, Robert A. Hankey and Susanne Hankey, Thomas E. Harding and June B. Harding, Stephen C. Hardy and Gail E. Hardy, Richard E. Harrington, Edwin J. Harvey, Richard A. Hase and Susanne Hase, Robert J. Hatala and Paula L. Hatala, Charles E. Hauerwas, Jr. and Margaret L. Hauerwas, Gerard T. Hayes and Mary P. Hayes, John F. Hayes and Anna M. Hayes, Robert M. Healey, David L. Heck and Joyce M. Heck, Robert P. Hedden and Louise B. Hedden, Franz J. Heinrichs and Irmgard Heinrichs, Thomas W. Heisey and Kathleen M. Heisey, Bruce A. Hemmer and Jean M. Hemmer, Constance I. Henderson, Thomas D. Herman and Antoinette M. Herman, Mark R. Herr and Jacqueline Herr, Robert M. Hess and Constance M. Hess, Thomas W. Hickmott and Joan M. Hickmott, Linda R. Hill and Craig J. Hill, George E. Hill and Franceen E. Hill, Estate Of Bernard J. Hizny and Bernadine A. Hizny, James F. Hobert and Mary Karen Hobert, Heinz G. Hoffmann and Monika Hoffmann, Roger E. Holbrook, Alvertis Hollister and Morna L. Hollister, David F. Homan and Dolores S. Homan, John E. Hostetler and Mary Ann E. Hostetler, Bemsley L. Hottenstein and Judith I. Hottenstein, Fred D. Howey and Nancy H. Howey, Stephen J. Hranek and Marlene P. Hranek, Susie A. Hricik and John P. Hricik, Michael D. Hryck and Mary J. Hryck, Stephen Hundiak and Catherine F. Hundiak, Kenneth A. Hunt and Joan M. Hunt, Stephen P. Hurban and Helen

Hurban, Arnold T. Iles, Jr. and Anne M. Iles, Kenneth H. Inman, Jr. and Deanna T. Inman, Joseph F. Jablonowski and Carol A. Jablonowski, Leonard C. Jackowski, Donald E. Jackson and Marguerite K. Jackson, Carl Janasiewicz and Kathie A. Janasiewicz, Carl G. Janis and Nancy Joyce Janis, Patricia J. Jankowski and Richard S. Jankowski, Dexter A. Jeannotte, Thomas G. Jensen and Barbara D. Jensen, Peter R. Jobin and Marianne Jobin, Hilton J. Johnston and Judith A. Johnston, Philip D. Jones and Kathleen M. Jones, John A. Joyce and Elizabeth A. Joyce, Betty L. Judd, Lois A. Jura and Raymond W. Jura, Anna M. Kabanek, Jack M. Kamishlian and Julia G. Kamishlian, Robert H. Katyl and Sandra L. Katyl, Thomas J. Kearney and Ann B. Kearney, Richard L. Keator and Rosanna M. Keator, Arthur C. Keener, III and Patricia A. Keener, Eduardo Kellerman and Anne S. Kellerman, Richard K. Kemmet and Norma E. Kemmet, Catherine F. Kenyon, James J. Kershaw and Elaine T. Kershaw, Walter F. Kessler and Lorraine J. Kessler, Henry F. Kestenis, H. Joseph Kester and Roxina L. Kester, Kenneth H. Kidder, Jr. and Verona B. Kidder, Jennette E. Kingsley and Bernard E. Kingsley, Edward T. Kisacky, Gail L. Klimek, Thomas H. Kline and Mary T. Kline, Neil G. Kline and Karen A. Kline, William J. Klish and Mary Ann Klish, Eugene P. Klym and Audrey C. Klym, Scott W. Knauss, Douglas R. Koban and Ruth E.B. Koban, John T. Kolias and Eleni Kolias, Andrew Komar and Catherine A. Komar, Donald G. Konikowski and Kathleen A. Konikowski, John F. Koniski and Florence L. Koniski, Frank J. Korosec and Amalia M. Korosec, Ethel A. Kostick and Stephen Kostick, Thomas J. Kotasek and Anna F. Kotasek, Bertine Kotek and Edward F. Kotek, Gerald J. Kovac and Jean M. Kovac, Gerald B. Kowalewski and Shirley S. Kowalewski, Robert W. Kraft and Judith A. Kraft, Robert J. Krajnyak and Marie A. Krajnyak, Richard

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A. Kramer and Patricia A. Kramer, Kenneth Kraut and Patricia E. Kraut, John M. Krein and Frances M. Krein, John M. Krotzer and Sharon M. Krotzer, John R. Krzyzewski and Donna E. Krzyzewski, Irving R. Kuenzli and Janet L. Kuenzli, Donald P. Kumpon and Ann M. Kumpon, Clark Kurtz and Johanna Kurtz, Lawrence V. Ladue and Bernice Ladue, Richard D. Lamb, Richard J. Lane and Eilleen F. Lane, Lee C. Lanois and Patricia W. Lanois, Elliott R. Larose and Marlene J. Larose, Joseph Larose and Sharon Larose, Jimmy C. Larson, James J. Larue and Patricia M. Larue, Walter A. Lastig and Beverly J. Lastig, Harry V. Laufer, Mary M. Lavin, Patricia Lazarou and George E. Lazarou, Donald J. Lazzarini and Anita L. Lazzarini, Ronald G. Leadbeater and Ruth Ann Leadbeater, Jerry N. Leatherman and Susan S. Leatherman, William A. Lee and Dolores E. Lee, Douglas H. Lee and Martha A. Lee, Frederick V. Legge and Mary M. Legge, Kenneth J. Lenish and Barbara A. Lenish, James A. Libous, Janis U. Liepins and Barbara J. Liepins, Sally D. Light and George S. Light, Jerry L. Lippold and Connie L. Lippold, Richard M. Lloyd and Jane H. Lloyd, James T. Locascio and Patricia F. Locascio, Jeanette R. Lockwood and James S. Lockwood, James M. Loughran and Patricia H. Loughran, Edward A. Luning and Lorraine A. Luning, James H. Lunn and Elizabeth A. Lunn, Robert J. Lynch and Sandra M. Lynch, Tonu Maasik and Laine Maasik, Klaus K. Maass and Helga G. Maass, John F. MacDonald and Eleanor M. MacDonald, Joseph S. Macek and June R. Macek, Theodore M. Madzy and Edna M. Madzy, Joseph C. Maher and Mary Ann Maher, Richard D. Maney and Robin Z. Maney, Paul E. Mann and Priscilla J. Mann, Robert G. Mann and Anne Lyle-Mann, Donald F. Manning and Helene G. Manning, Robert P. Mappes and Mary Lou Mappes, Andrew P. Margetanski, William D. Markovitz

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Nos. 00-1065 and 00-1066

In the Supreme Court of the United States

ERNEST N. MILES, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

DOUGLAS R. WILLOUGHBY, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURTS OF APPEALS FOR THE SECOND AND FEDERAL CIRCUITS

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether payments received by departing employees as part of a downsizing program are subject to Federal Insurance Contributions Act (FICA) taxes under 26 U.S.C. 3101 *et seq.*

2. Whether payments received by departing employees as part of a downsizing program are excludable from income under Section 104(a)(2) of the Internal Revenue Code, 26 U.S.C. 104(a)(2), as damages received on account of personal injury or sickness.

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In the Supreme Court of the United States

No. 00-1065

ERNEST N. MILES, ET AL., PETITIONERS

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UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURTS OF APPEALS FOR THE SECOND AND FEDERAL CIRCUITS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals in No. 00-1065 (00-1065 Pet. App. 1a-2a) is reported at 231 F.3d 889. The opinion of the district court in that case (00-1065 Pet. App. 3a-20a) is reported at 76 F. Supp. 2d 236.

The opinion of the court of appeals in No. 00-1066 (00-1066 Pet. App. 1a-10a) is reported at 228 F.3d 1360. The opinion of the Court of Federal Claims in that case (00-1066 Pet. App. 11a-42a) is reported at 44 Fed. Cl. 260.

JURISDICTION

The judgment of the court of appeals in No. 00-1065 was entered on October 17, 2000, and the petition for a writ of certiorari was filed on January 2, 2001. The judgment of the court of appeals in No. 00-1066 was entered on September 28, 2000, and the petition for a writ of certiorari was filed on December 27, 2000. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

This case involves two parallel actions that concern the tax liabilities of over 3000 employees of IBM who received payments from that company during 1988-1992 as part of that company's downsizing programs. Petitioners contend that the lump-sum payments they received upon the termination of their employment are excluded from gross income under Section 104(a)(2) of the Internal Revenue Code (as in effect during those years) as damages received "on account of personal injuries or sickness." 26 U.S.C. 104(a)(2). Petitioners also contend that these same payments are not wages subject to Federal Insurance Contributions Act (FICA) taxes under 26 U.S.C. 3101 *et seq.*

1. *No. 00-1065 (Miles v. United States)*

a. Petitioner Ernest Miles was selected to serve as the representative plaintiff for the 700 plaintiffs who filed actions in the United States District Court for the Northern District of New York.[1] From 1988 through 1996, between sixty and eighty thousand employees left work at IBM pursuant to several workforce

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[1] Petitioner Betty Miles is a party to this action solely because she filed a joint return with Ernest Miles. See 00-1065 Pet. App. 5a n.2.

reduction programs implemented at that company. 00-1065 Pet. App. 6a. These downsizing programs were adopted to encourage employees to terminate their employment with IBM either through resignation, pre-retirement leave of absence or early retirement. 00-1065 Pet. App. 6a-7a. "IBM designated the employees eligible to participate in the downsizing programs based upon a determination of surplusage in specific skills or positions." *Id.* at 6a. IBM offered a lump-sum payment to each participant that was based on the years of service and salary of the employee at the time of termination. *Id.* at App. 7a. For employees who accepted this offer, IBM withheld income and employment taxes from the payments as they were made. *Ibid.*

Eligibility in the voluntary downsizing programs was limited to employees who were in particular skill or job categories. 00-1065 Pet. App. 6a. IBM retained the right to reject any request to participate in the downsizing program from employees who possessed skills that were critical to continued operations. Eligibility for participation in the downsizing programs was not based, even in part, on whether the employee possessed any tort claim against IBM for personal injuries.[2] 00-6029 C.A. App. 99-100, 178-179, 329-330.

b. Petitioner participated in a voluntary downsizing program in 1992 which provided each participant with a lump-sump payment of one week's pay for every six months of service (up to a maximum of 52 weeks). 00-6029 C.A. App. 328. Each employee who elected to

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[2] "The primary purpose for the downsizing programs was not to obtain waivers of claims from employees nor to compensate or settle personal injury or any other tort claims of employees." 00-1065 Pet. App. 6a.

participate in the downsizing program was required to resign from the company and sign a general waiver of claims against IBM. 00-1065 Pet. App. 6a-7a. The release employed for this purpose was a broad, standard form. It was not negotiated by any of the parties and was not tailored to any participant's individual circumstances. 00-6029 C.A. App. 171-172.

Under this broad, form release, petitioner released IBM from all claims "arising from the Age Discrimination in Employment Act of 1967, as amended, Title VII of the Civil [R]ights Act of 1964, as amended, and any other federal or state law dealing with discrimination in employment," as well as all "claims based in theories of contract or tort, whether based on common law or otherwise." 00-1065 Pet. App. 8a. The release specified that IBM would withhold all appropriate payroll taxes from the payment and that, if the employee thereafter returned to work at IBM, the company would have the right to require repayment of a prorated portion of the lump-sum amount. 00-6029 C.A. App. 340-341.

Petitioner has acknowledged that, before he signed this form release, he had not (i) experienced symptoms of physical or emotional harm, (ii) asserted or threatened any claim against IBM or (iii) communicated with IBM regarding any personal injuries or claims for personal injury. 00-1065 Pet. App. 4a. Petitioner further testified that he suffered no physical or emotional problems during the 1988 through 1992 period; that at the time he participated in the downsizing program, he was not aware of any injury or sickness caused by IBM; and that he did not suffer any ill health

during 1991 or 1992. 00-6029 C.A. App. 291-292, 257, 274-282.[3]

IBM's representative stated in deposition testimony that IBM was not aware of any claim for personal injury that petitioner might have had against it. He further stated that IBM did not make the downsizing payment to petitioner with the intent to compensate or settle a personal injury claim or other tort claim. 00-6029 C.A. App. 156-158, 162.

c. Petitioner timely filed his federal income tax return for 1992 and paid the taxes due. Petitioner thereafter filed a claim for refund of the income and FICA taxes withheld from his lump-sum payment from IBM. He contended that this payment was received in settlement of claims based upon tort and tort-type rights and was therefore excluded from income under Section 104(a)(2) of the Internal Revenue Code, 26 U.S.C. 104(a)(2).[4] Petitioner contended further that the separation pay did not constitute "wages" to which the FICA taxes apply. The Internal Revenue Service

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[3] Petitioners' assertions (00-1065 Pet. at 3) that IBM faced significant risk of personal injury claims from all downsizing employees, that all downsized employees suffered varying degrees of reputational and emotional injuries, and that all downsized employees had bona fide personal injury claims are not supported by the record. In fact, (i) petitioner acknowledged that he had suffered no personal injury and (ii) the court found that petitioner had adduced no facts that could support a bona fide tort or tort-type claim against IBM. 00-1065 Pet. App. 15a.

[4] Petitioner also initially claimed that a recovery on any suit arising under the Age Discrimination in Employment Act would be excluded from income under Section 104(a)(2). This Court held in *Commissioner* v. *Schleier*, 515 U.S. 323 (1995), however, that damages received in settlement of an action based on the ADEA are not excluded under Section 104(a)(2).

denied the refund claim, and petitioner commenced this refund action in district court.

d. The district court granted the government's motion for summary judgment. 00-1065 Pet. App. 3a-20a.

The court first concluded that "scrutiny of the undisputed facts leads to the inexorable conclusion that [petitioner's] payment does not fall within the exclusion of section 104(a)(2)" because the payment was not damages received in a settlement of a tort or tort-type cause of action. 00-1065 Pet. App. 15a. The court noted that the agreement between petitioner and IBM arose out of a business downsizing program and not out of any "bona fide dispute between IBM and [the petitioner]." *Ibid.* The court explained that, at the time petitioner signed the general release and received the payment, he was not aware that he had suffered, and in fact was not suffering, from personal injuries. *Ibid.* Moreover, petitioner had not notified IBM, or communicated with the company in any way, concerning any claim of physical or emotional harm. The court concluded that petitioner had "adduced no facts that an underlying bona fide tort or tort type claim existed. Accordingly, it cannot be said that the payment in exchange for the Release in any way constituted settlement of a personal injury claim." *Ibid.* The court further held that even if petitioner had suffered injuries of which he was not aware, he still could not prevail. The court explained that if IBM and petitioner were both unaware of any asserted injury, they could not have entered into a settlement of claims regarding such injuries. "In other words, * * * the parties could not settle a claim that neither knew to exist." *Id.* at 16a. The court additionally concluded that the payment was not excluded from income under Section 104(a)(2) because it was not

received on account of personal injuries or sickness. The court pointed out that the downsizing "payment was calculated based upon [p]etitioner's years of service and salary, and was in no way linked to any personal injuries he may have suffered." *Id.* at 17a-18a.

Second, the court rejected petitioner's argument that the downsizing payment was not subject to FICA taxes. The court concluded that the downsizing payment—which was calculated based upon the years of service and salary received by petitioner—represented compensation paid within the scope of the employer-employee relationship and therefore constitute "wages" to which the FICA taxes apply. 00-1065 Pet. App. 19a.

e. The court of appeals affirmed in a per curiam opinion, "substantially for the reasons stated in the opinion of the district court." 00-1065 Pet. App. 1a-2a.

2. *No. 00-1066 (Willoughby v. United States)*

a. Petitioners Willoughby, Hill, Marciano, and Jordan also received similar downsizing payments from IBM.[5] They were selected to serve as test cases from among the 2631 individual plaintiffs who filed tax refund actions in the Court of Federal Claims. As in the case just described, the downsizing programs provided a lump-sum payment based on years of service and salary, which was payable to employees if they

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[5] All but one of these petitioners participated in voluntary downsizing programs that were similar to the one in which petitioner Miles (No. 00-1065) participated. Petitioner Jordan participated in an analogous *in*voluntary downsizing program—after receiving a layoff notice, she elected to take the same downsizing payment available, and sign the same standard form release required, under the voluntary downsizing programs in which the other petitioners participated. 00-1066 Pet. App. 18a-19a.

agreed to resign or retire and sign a general release. Petitioners did not negotiate the amount of the payments, which was set by formula, and did not negotiate the form language contained in the release. 00-1066 Pet. App. 2a-4a. The general releases signed by these petitioners were in the same form described above. See page 4, *supra*. In addition, here, as in No. 00-1065, the petitioners stipulated that they did not experience any symptoms of personal injury, that they did not assert or threaten any claim against IBM for personal injury, and that they did not communicate with IBM regarding any personal injuries or claims for personal injury. 00-1066 Pet. App. 4a.

b. After their claims for refund were denied by the Internal Revenue Service, petitioners commenced these refund suits in the Court of Federal Claims. The court granted the government's motion for summary judgment on both the FICA and income tax issues. 00-1066 Pet. App. 11a-42a.

With respect to petitioners' claims under Section 104(a)(2), the court concluded that, "[v]iewing the facts and inferences from the facts most favorably to [petitioners], they arguably have shown that IBM's decision to require 'releases' stemmed from its concern over potential tort claims. [Petitioners] have not, however, adduced any evidence to show that the 'payments' or 'recovery' they received from IBM were in any way tied to that concern." 00-1066 Pet. App. 30a. The court noted that petitioners never made a formal or informal claim against IBM and, moreover, have stipulated that they never experienced any symptoms of personal injury or sickness. The court concluded that, absent any formal or informal claim and any symptoms of personal injury, there is no basis to find that the payments received by petitioners were "on account of" personal

injuries as required by Section 104(a)(2). *Id.* at App. 32a-33a. The court noted that not only had none of petitioners suffered any personal injuries or threatened any claim against IBM, but IBM had given no consideration to potential tort liability or personal injury claims in devising its payment formula and did not allocate any portion of the program payments as compensation for possible tort claims. *Id.* at 33-34.

The court concluded that, instead of compensation for personal injuries, these payments were in the nature of severance pay. 00-1066 Pet. App. 40a. Because they were calculated solely on the basis of employment tenure and salary, and had the characteristics of severance pay, the court held that these payments were derived from the employee-employer relationship and were therefore subject to FICA taxes. *Id.* at 39a-41a.

c. The court of appeals affirmed. 00-1066 Pet. App. 1a-10a. The court agreed that the downsizing payments were in the nature of severance payments and were not received "on account of personal injuries or [physical] sickness." *Id.* at 6a. The court stated that, "[e]ven assuming that the employees suffered some personal injury before entering the payment agreements, no evidence of record suggests that any part of the payments was attributable to those individualized injuries." *Ibid.* The court further noted that, "[r]ather than reflecting an individualized amount for each employee based on the unique individual injuries of that employee, the payments reflected an amount associated with the employee's work record. * * * Thus, as in [*Commissioner* v.] *Schleier*, the amount of payment was 'completely independent of the existence or extent of any personal injury.' 515 U.S. at 330." *Ibid.*

The court also rejected petitioners' claim that the downsizing payments were not "wages" subject to

FICA taxes. The court explained that the statutory term "wages" is not limited to compensation for services actually rendered. Instead, it includes all compensation paid to employees from "the employer-employee relationship." 00-1066 Pet. App. 9a (citing *Social Security Board* v. *Nierotko*, 327 U.S. 358, 365-366 (1946)). The court concluded that the fact that the receipt of benefits was conditional upon the employees' signing a broad, form release did "not change the wage-like or severance-like character of the payments." *Id.* at 10a.

ARGUMENT

The decisions of the courts of appeals are correct and do not conflict with any decision of this Court or any other court of appeals. Further review is therefore not warranted.

1. a. The FICA taxes that finance Social Security and Medicare benefits were properly imposed on the lump-sum payments that petitioners received from IBM. The FICA taxes are imposed on "wages," a term that is generally defined to include "all remuneration for employment." 26 U.S.C. 3121(a). The term "employment" is, in turn, generally defined to include "any service, of whatever nature, performed * * * by an employee for the person employing him." 26 U.S.C. 3121(b).[6] In *Social Security Board* v. *Nierotko*, 327

[6] The regulations adopted by the Treasury to implement these provisions specify that remuneration for employment generally "constitutes wages even though at the time paid the relationship of employer and employee no longer exists between the person in whose employ the services were performed and the individual who performed them." 26 C.F.R. 31.3121(a)-1(i). Similarly, "the basis upon which the remuneration is paid is immaterial in deter-

U.S. 358 (1946), this Court noted the great breadth of these provisions in concluding that back pay awarded under the National Labor Relations Act to an employee who had been wrongfully discharged constitutes "wages" under the statutory definition (*id.* at 365-366):

> The very words "any service . . . performed . . . for his employer," with the purpose of the Social Security Act in mind, import breadth of coverage. They admonish us against holding that "service" can be only productive activity. We think "service" as used by Congress in this definitive phrase means not only work actually done but the entire employer-employee relationship for which compensation is paid to the employee by the employer.

See also *United States* v. *Silk*, 331 U.S. 704, 712 (1947); *Gerbec* v. *United States*, 164 F.3d 1015, 1026 (6th Cir. 1999) ("[t]he phrase 'remuneration for employment' as it appears in § 3121 should be interpreted broadly"); *Mayberry* v. *United States*, 151 F.3d 855, 860 (8th Cir. 1998).

The lump-sum payments from IBM fall within the broad statutory definition of "wages." The payments are in the nature of severance pay. They were calculated based on each departing employee's length of service at IBM and salary at the time of separation, and they were not provided in exchange for the relinquishment of any preexisting contractual right. In fact, IBM treated the payments as wages in determining its own employment tax obligations, and the employees were required to make a repayment if they were sub-

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mining whether the remuneration constitutes wages." 26 C.F.R. 31.3121(a)-1(d).

sequently rehired.[7] Under these severance programs, the separation pay was provided to ease the employees' transition to a new career or retirement. Because the payments arose directly from the employment relationship between petitioners and IBM, they constitute "remuneration for employment" and thus represent "wages" to which the FICA taxes apply.

b. The evolution and legislative history of the FICA tax provisions reflect that payments made upon the dismissal of an employee are to be treated as "wages" subject to the FICA tax. Prior to 1950, the statute had excluded from the definition of wages for FICA tax purposes dismissal payments that the employer was not legally required to make. That exclusion was eliminated in the Social Security Act Amendments of 1950, ch. 809, 64 Stat. 477. The Committee Reports describe the effect of the change as follows:

> Therefore, a dismissal payment, which is any payment made by an employer on account of involuntary separation of the employee from the service of the employer, will constitute wages subject, of course, to the $3,600 limitation, irrespective of whether the employer is, or is not, legally required to make such payment.

H.R. Rep. No. 1300, 81st Cong., 1st Sess 124 (1949) (emphasis added). See also S. Rep. No. 1669, 81st Cong., 2d Sess. 130 (1950).

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[7] Petitioners err in suggesting (00-1065 Pet. 9; 00-1066 Pet. 9) that the payments were not intended as a substitute for income. The company's witness actually testified that the payments were in fact intended as a form of severance pay. 00-6029 C.A. App. 118-120, 178.

Applying this same rule, the courts below correctly concluded (00-1065 Pet. App. 19a) that:

> the payments were made by IBM, as employer, to Miles its employee. The payment amount was calculated based upon Miles' employment with IBM, using a formula taking into account Miles' years of service and salary. The payment must be considered as compensation within the employment relationship, although not for work actually done.

See also 00-1066 Pet. App. 39a ("The undisputed facts show that IBM calculated the payments solely on the basis of employment tenure and salary."). The courts below properly held that "the payments at issue clearly were derived from a severance-type formula based on the employee-employer relationship" and thus "constitute wages subject to FICA." *Id.* at 41a.[8]

c. Petitioners err in asserting that a series of cases dealing with employer reimbursements of employee moving and travel expenses (such as meal allowances) indicate that "post-*Nierotko* decisions have uniformly and correctly held that payments to an employee for noncompensatory reasons are not 'wages' for FICA or income tax withholding." 00-1065 Pet. 17. The cases cited by petitioners (*Allstate Ins. Co.* v. *United States*, 530 F.2d 378 (Ct. Cl. 1976), *Humble Oil & Refining Co.* v. *United States*, 442 F.2d 1362 (Ct. Cl. 1971), and *Humble Pipe Line Co.* v. *United States*, 442 F.2d 1353 (Ct. Cl. 1971)) hold only that an employer's reimbursement of costs incurred by employees does not

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[8] Petitioners therefore are wrong in asserting (00-1065 Pet. 20; 00-1066 Pet. 20) that the courts below did not determine that the downsizing payment was made as remuneration for employment.

represent "wages" subject to FICA taxes.[9] This case does not involve similar reimbursements of employee-incurred expenses, however, and the cases cited by petitioners are obviously far afield from the present case.

d. The cases that have considered the issue addressed here have consistently concluded that employer payments made in connection with downsizing programs represent "wages" to which the FICA taxes apply. See, *e.g.*, *Associated Electric Cooperative* v. *United States*, 226 F.3d 1322 (Fed. Cir. 2000); 00-1065 Pet. App. 1a-2a; 00-1066 Pet. App. 1a-10a.[10] Petitioners

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[9] Similarly, in *Central Illinois Public Service Co.* v. *United States*, 435 U.S. 21, 32-33 (1978), this Court held that reimbursement of meal expenses incurred in connection with overnight travel did not constitute "wages" subject to income tax withholding. See also *Stubbs, Overbeck & Assocs., Inc.* v. *United States*, 445 F.2d 1142 (5th Cir. 1971) (living allowances provided employees at remote work sites not subject to income tax withholding).

[10] In *Hemelt* v. *United States*, 122 F.3d 204, 209 (4th Cir. 1997), the court concluded that Employee Retirement Income Security Act of 1974 (ERISA) class action "settlement payments fit easily within FICA's broad definition of " 'wages' as 'all remuneration for employment unless specifically excepted.' " *Accord, Mayberry* v. *United States*, 151 F.3d 855 (8th Cir. 1998); *Gerbec* v. *United States*, 164 F.3d 1015, 1025 (6th Cir. 1999). In *Dotson* v. *United States*, 87 F.3d 682, 690 (5th Cir. 1996), however, the court held that a component of the same class action settlement payment compensating for future lost wages was not subject to FICA taxes because it "compensated for 'loss in earning capacity,' not for services already performed." In that case, however, unlike the present case, an actual claim for damages from personal injury had been asserted and settled by the parties, and the court's conclusion was based upon the principle that "[d]amages not included in the tax code's definition of 'income' are not considered 'wages.' " *Id.* at 689. The court further noted that an award of "damages" from loss

nonetheless assert (00-1065 Pet. 19; 00-1066 Pet. 19) that, because downsizing payments are made to induce employees to leave the company, they should not be characterized as remuneration for services rendered. In an effort to support that proposition, petitioners seek to rely (*Ibid.*) on *Lockheed Corp.* v. *Spink*, 517 U.S. 882 (1996). The question addressed in *Lockheed*, however, was whether certain specific retirement plan provisions were inconsistent with the requirements of ERISA. In a footnote to that decision, the Court noted that, while retirement benefits "may be defined as deferred wages," the payments received under an early retirement program compensate the employee not "so much for services rendered as for the distinct act of leaving the company sooner than planned." *Id.* at 895 n.7. It is clear that the decision in *Lockheed* has no application to the issues presented here, for the Court in *Lockheed* did not address (and had no occasion to consider) the proper interpretation or application of the FICA taxes on "wages." When the Court *has* specifically addressed FICA taxation, and considered the specific text and history of that statute, it has concluded that payments derived from the employer-employee relationship represent "remuneration for employment" to which the FICA taxes apply. *Social Security Board* v. *Nierotko*, 327 U.S. at 364-366. Nothing in *Lockheed* purports to narrow, or even address, that longstanding holding of this Court.[11]

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of future "earnings capacity" is distinct from the "remuneration for employment" to which FICA taxation applies. *Id.* at 690. For the reasons described below, that rationale is inapplicable to the present cases. See pages 16-18, *infra*.

[11] The case of *Waterman* v. *Commissioner*, 179 F.3d 123 (4th Cir. 1999), is similarly inapplicable, for it concerned whether a severance payment received under a Navy downsizing program is

2. a. The courts below also correctly held that the lump-sum payments that petitioners received from IBM are not excluded from income under Section 104(a)(2) of the Internal Revenue Code as "damages received * * * on account of personal injuries or sickness."[12] 26 U.S.C. 104(a)(2). The term "damages received" means "an amount received * * * through prosecution of a legal suit or action based upon tort or tort type rights, or through a settlement agreement entered into in lieu of such prosecution." 26 C.F.R. 1.104-1(c). Under the statute and regulation, an amount may be excluded from gross income only when it is received (i) through prosecution or settlement of an action based upon tort or tort-type rights and (ii) on account of personal injuries or sickness. *Commissioner* v. *Schleier*, 515 U.S. 323, 337 (1995). Applying these settled criteria, the Second, Fifth, and Federal Circuits have unanimously concluded that the downsizing payments made by IBM that are involved in this case are not excluded from income under this statute.[13] *Gajda* v. *Commissioner*, 158 F.3d 802 (5th Cir. 1998); *Lubart* v. *Commissioner*, 154 F.3d 539 (5th Cir. 1998); 00-1065 Pet. App. 1a-2a; 00-1066 Pet. App. 1a-10a. There is no

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excluded from income as "combat" pay under Section 112 of the Internal Revenue Code. See 179 F.3d at 127.

[12] In the Small Business Job Protection Act of 1996, Pub. L. No. 104-188, § 1605(a), 110 Stat. 1838, Congress amended Section 104(a)(2) to exclude from gross income only damages paid on account of "physical" injuries and sickness. That amendment does not apply to this case because the releases were signed prior to the effective date of that Act. See 110 Stat. 1838.

[13] Indeed, each of the 17 decided cases involving claims by former IBM employees have held that these downsizing payments are taxable compensation. See 00-1066 Pet. App. 26a.

conflict among the circuits nor other reason warranting further review in this case.

b. The record amply establishes that the payments to petitioners were not damages received in settlement of a tort or tort-type right. Petitioners stipulated that they never raised with IBM any specific tort claim or claim for personal injury, and that they never suffered symptoms of personal injuries or of physical or emotional harm as of the date they left active employment at IBM. See pages 4, 8, *supra*. The releases signed by petitioners were standard form releases that did not reflect a negotiated compromise of actual claims. Everyone who participated in each program received a lump-sum payment calculated in exactly the same way. The amount of the payment was based on salary and length of service, and was not calculated based on the value of any particular claim or injury alleged to have been sustained. The releases signed by petitioners were not negotiated by IBM and petitioners in the context of a pending claim or lawsuit, but were instead imposed in the context of a corporate downsizing effort. The releases were drafted by IBM and were not tailored to any individual circumstances. In this context, the courts below correctly concluded that there was no settlement of any tort-type claim since neither party knew "any such claim existed." 00-1065 Pet. App. 17a.

Petitioners also do not satisfy the second, independent requirement of Section 104(a)(2), that the asserted damages be received "on account of personal injuries." *Commissioner* v. *Schleier*, 515 U.S. at 336-337; see also *O'Gilvie* v. *United States*, 519 U.S. 79, 84-88 (1996). The downsizing payments were not made to petitioners on account of any personal injury; these payments compensate only for economic losses, not personal damages.

The payments and benefits offered by IBM were based upon the prior length of service and salary of the employees, and gave no consideration to any employee's individual circumstances.

The courts below thus correctly held that these corporate downsizing payments were not "on account of" any personal injury. Here, "as in *Schleier*, the amount of payment was 'completely independent of the existence or extent of any personal injury.'" 00-1066 Pet. App. 6a (quoting *Commissioner* v. *Schleier*, 515 U.S. at 330). See also 00-1065 Pet. App. 17a-18a ("[t]he payment was calculated based upon [petitioners'] years of service and salary, and was in no way linked to any personal injuries [they] may have suffered").

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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Nos. 00-1065 and 00-1066

In The

Supreme Court of the United States

ERNEST N. MILES, ET AL., *Petitioners,*

v.

UNITED STATES OF AMERICA, *Respondent.*

DOUGLAS R. WILLOUGHBY, ET AL., *Petitioners,*

v.

UNITED STATES OF AMERICA, *Respondent.*

On Petitions For Writs of Certiorari
To The United States Courts of Appeals
For The Second and Federal Circuits

PETITIONERS' REPLY TO UNITED STATES' BRIEF IN OPPOSITION

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INTRODUCTION

Respondent's Brief in Opposition mischaracterizes both the factual records and the opinions below. These mischaracterizations obscure the actual legal holdings in these cases, which are important and incorrect interpretations of this Court's decision in *Commissioner v. Schleier*, 515 U.S. 323 (1995).

Respondent portrays the courts below as having found (1) that petitioners had no bona fide potential tort claims that could have been settled and (2) that IBM therefore could not have made the payments to petitioners to settle their potential claims.

In fact, the courts below did not address whether petitioners had bona fide potential tort claims that they could have asserted against IBM. Instead, the courts relied on incorrect legal holdings that made the existence of bona fide potential claims irrelevant.

As petitioners stated in the Petitions, the decisions below hold that where payments to a group of departing employees are based on salary and length of service, the payments are includable in income and subject to FICA taxes *even if* the employees have bona fide tort claims that they could have asserted against the employer and the employer's reason for making the payments is to avoid the employees' potential claims.

RESPONDENT'S ERRONEOUS STATEMENTS REGARDING THE FACTUAL RECORD AND THE OPINIONS BELOW

1. Regarding the record and lower court decision in the *Miles* case, respondent states: "In fact, (i) petitioner acknowledged that he had suffered no personal injury and (ii) the court found that petitioner had adduced no facts that could support a bona fide tort or tort-type claim against IBM. 00-1065 Pet. App. 15a." Resp. Opp. 5 n. 3.

Both parts of respondent's statement are false.

a. Petitioner Miles did not stipulate that he had suffered no personal injury. Rather, he stipulated that he had experienced no symptoms of physical or emotional harm. Moreover, he testified that he suffered embarrassment, humiliation, and *reputational* harm.

b. The district court did not find that petitioner Miles adduced "no facts that could support a bona fide tort or tort-type claim." Rather, the district court found that Miles adduced "no facts that an underlying bona fide tort or tort type claim existed." 00-1065 Pet. App. 15a. Read in context, the quoted statement means only that there was no open dispute between Miles and IBM. Thus, the district court's actual finding is quite distinct from a finding that Miles did not have any bona fide claim that he *could have asserted*. This distinction is the very foundation of the third Question raised in the *Miles* Petition. Under the decision below in the *Miles* case, a payment made for the purpose of avoiding a bona fide potential personal injury claim that has not yet been asserted cannot be treated as a settlement for purposes of I.R.C. § 104(a)(2).

2. Regarding the lower court decision in the *Miles* case, respondent states: "The court explained that, at the time petitioner signed the general release and received the payment, he was not aware that he had suffered, and in fact was not suffering, from personal injuries." Resp. Opp. 6. This statement is erroneous. The district court did not state or imply that petitioner Miles was not suffering from personal injuries such as reputational injuries.

3. Regarding the lower court decision in the *Willoughby* case, respondent states: "The court noted that not only had none of petitioners suffered any personal injuries or threatened any claim against IBM . . . ." Resp. Opp. 9. This statement is erroneous. The Court of Claims did not state or imply that none of the *Willoughby* petitioners suffered any personal injuries such as reputational injuries.

4. Respondent states: "The payments are in the nature of severance pay. . . . [T]hey were not provided in exchange for the relinquishment of any preexisting contractual right." Resp. Opp. 11. This statement incorrectly implies that the payments IBM made to petitioners were made on account of petitioners' past services and were not in exchange for the relinquishment by petitioners of valuable rights. Respondent's statement is belied by the record. IBM's witness testified that the payments were *not* made as remuneration for services. 00-6029 C.A. App. 211; 99-5136 C.A. App. 1232. IBM's witness also testified that the payments were "part of an approach used during 1990 to 1995 that was designed to ensure that IBM's departing employees would not sue the company after they left." 00-6029 C.A. App. 208-09; 99-5136 C.A. App. 1225-26. In the *Willoughby* case, respondent stipulated that the payments to petitioners

were made in exchange for executing releases. 99-5136 C.A. App. 948-49.

5. Respondent states: "Petitioners err in suggesting . . . that the payments were not intended as a substitute for income." Resp. Opp. 12 n. 7. Respondent's statement is false. IBM's witness testified as follows:

> Q. Did IBM intend the payment provided under the voluntary transition programs during 1990 through 1996 including the ITO-2 program to be available as a form of severance pay and as a substitute for the income that the employee would otherwise have earned while working at IBM?
>
> A. I think the answer to that is probably no because it wasn't meant to be a substitute for the income that they otherwise would have had at IBM. . . . So it was not meant to be a substitute for their income.

00-6029 C.A. App. 144; 99-1536 C.A. App. 1146

6. Respondent incorrectly denies that post-*Nierotko* decisions have held that payments to employees for noncompensatory reasons are not "wages" for FICA purposes, asserting that the cited decisions "hold only that an employer's reimbursement of costs incurred by employees does not represent 'wages' subject to FICA taxes." Resp. Opp. 13-14. Respondent's assertion is erroneous. Respondent ignores the fact that the *reason* the reimbursements at issue in the cited cases were held not to be wages was that they were *not made as remuneration for services.*

7. Respondent erroneously states that it is a longstanding holding of this Court that "payments derived from the employer-employee relationship represent 'remuneration for employment' to which FICA taxes apply." Resp. Opp. 15, *citing Social Security Board v. Nierotko*, 327 U.S. 358 (1946).

Nierotko did not hold that "payments derived from the employer-employee relationship represent remuneration for employment." *Nierotko*, which dealt with back wages awarded to a wrongfully discharged employee, held only that the term "service", as used in the Social Security statute, means "the entire employer-employee relationship for which compensation is paid to the employee by the employer." 327 U.S. at 365-66. In *Central Illinois Public Service Co. v. United States*, 435 U.S. 21, 30-31 (1978), decided 32 years after *Nierotko*, this Court flatly rejected the United States' argument that all payments from an employer to an employee are "wages." Similarly, in *Royster Company v. United States*, 479 F.2d 387, 390 (8th Cir. 1973), the Eighth Circuit stated: "We cannot agree that any payment made to the employee which is 'attributable to the employment relationship' constitutes wages . . . ." *See also* the cases cited at 00-1065 Pet. 17-18; 00-1066 Pet. 17-18.

8. Respondent asserts: "[T]he courts below correctly concluded that there was no settlement of any tort-type claim since neither party knew 'any such claim existed,'" citing 00-1065 Pet. App. 17a (district court decision in *Miles*). Resp. Opp. 17. This assertion erroneously implies that the courts below determined that the payments to petitioners were not "settlements" because IBM was not aware that it would face a serious risk of tort claims if it

did not make the payments. Neither court below made such a determination.

a. The district court in the *Miles* case determined only that IBM was not aware of *petitioner Miles' specific claims.* 00-1065 Pet. App. 17a. Thus, the district court concluded as a matter of law that IBM's recognition of its tort risk from the departing employees *as a group* was insufficient to cause the payment to any particular employee to be a settlement. This characterization of the *Miles* decision is reinforced by the Court of Claims' acknowledgment in the *Willoughby* case that "IBM had serious and realistic concerns about the threat of lawsuits that could be brought, including concerns about arguably tortious acts, and the emotional suffering caused by downsizing." 00-1066 Pet. App. 21a.

b. In the *Willoughby* case, the Federal Circuit did not determine that the payments were not "settlements," affirming the Court of Claims' I.R.C. § 104(a)(2) decision only on the ground that the payment were not "on account of personal injuries." *See* 00-1066 Pet. App. 6a.

CONCLUSION

The petitions for writs of certiorari should be granted.

Respectfully submitted,

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